Administrative Justice Project White Paper Reports

Reports and Recommendations
prepared by
Administrative Justice Project
for the
Attorney General of British Columbia

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The Administrative Justice Project was established in July 2001 for the purpose of carrying out a comprehensive review of British Columbia's system of administrative justice. The focus of this work has been the more than 50 administrative tribunals that form the core of this part of the province's justice system.

The material in this publication includes six reports that were prepared in support of and released with the Project's White Paper, On Balance: Guiding Principles for Administrative Justice Reform in British Columbia. These reports address the following topics:

Charter Jurisdiction

Dispute Resolution

Independence and Accountability

Making Sound Appointments

Providing Administrative Tribunals with Essential Powers and Procedures

Standing to Appear before Administrative Tribunals

The other publications of the Administrative Justice Project include six background papers released between December 2001 and May 2002. Four of these papers have been consolidated for convenience under the title, Administrative Justice Review. These papers address the following topics:

Administrative Agencies and the Charter

Reviewing Original Decisions: Guiding Principles and Options

Standard of Review on Judicial Review or Appeal

The Statutory Powers and Procedures of Administrative Tribunals in British Columbia

The fifth background paper, Human Rights Review, has been released as a separate publication. The sixth background paper, Appointments: A Policy Framework for Administrative Tribunals, has not been published separately as it has been updated and released, as a report with recommendations, in conjunction with the Project's White Paper.

The Terms of Reference for the Administrative Justice Project, the White Paper and all of the background papers and reports are available on the Project's website at www.gov.bc.ca/ajp. Interested readers are invited to contact the Project at ajp@ag.gov.bc.ca.

CHARTER JURISDICTION

Report and Recommendations

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July 2002

FOREWORD

The following report was prepared for British Columbia's Administrative Justice Project. Established in July 2001, the Project is part of the government's commitment to ensure that the administrative justice system is accessible, efficient, fair and affordable.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. It has also set forth a series of recommendations to address the most significant challenges facing the system today.

This report addresses issues related to the *Charter* jurisdiction of administrative tribunals. In some circumstances, it may be open to one of the parties in a proceeding before an administrative tribunal to raise a question about whether a provision in the tribunal's enabling statute is contrary to the *Charter of Rights and Freedoms*. *Charter* litigation is highly specialized and complex. Administrative tribunals seldom have the legal expertise, institutional capacity or procedural rules to address these challenges effectively. Furthermore, unlike the courts where decisions set precedents to be applied in subsequent proceedings, the decisions of administrative tribunals are not binding on their future cases. A tribunal's decision on the application of the *Charter* in one context need not necessarily be considered in another. As a consequence, resources dedicated to addressing complex *Charter* challenges may not have lasting value for the tribunal, the parties who appear before the tribunal or the community at large.

Legislative clarification is required to establish which tribunals have jurisdiction to entertain a *Charter* challenge and, for those that do, when the tribunal can refer a *Charter* question to court. There must also be a process in place to ensure that notice is given to the Attorney General in those cases where a tribunal hears a *Charter* challenge.

The analysis and recommendations presented here support the Administrative Justice Project's White Paper. Copies of the White Paper, other background papers, reports and further information on the Project are available through the Internet at: www.gov.bc.ca/ajp.

Interested readers are invited to provide comments on the White Paper and related reports before November 15, 2002 by:

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Table of Contents

Introduction 1
Current Law: A Need for Reform 3
Responses to the Background Paper 5
Recommendation 6
Which Tribunals Should Exercise *Charter* Jurisdiction? 6
Responses to the Background Paper 7
Discussion 7
Recommendations 12
Procedural Reform 14
Power to Refer to Court 14
Notice under the *Constitutional Question Act* 15
Conclusions and Recommendations 16

INTRODUCTION

Administrative tribunals hold hearings and make decisions under specific statutes. For example, the *Labour Relations Code* is the enabling or parent statute for the Labour Relations Board. It governs the types of decisions which can be made by the board. Similarly, the *Community Care Facility Act* is the enabling statute for the Community Care Facility Appeal Board.

A party to a hearing sometimes asks a tribunal to decide that a provision in its enabling statute should not be applied by the tribunal, on the basis that the provision is inconsistent with the *Charter of Rights and Freedoms*. For example, in one case, a union asked the Labour Relations Board to rule that the definition of secondary picketing in the *Labour Relations Code* was too broad and offended against freedom of expression as protected in section 2(b) of the *Charter*.[1] In other cases, the Appeal Division of the Workers' Compensation Board has considered whether a

[1] *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083.

provision of the *Workers Compensation Act* dealing with spousal pensions is contrary to the *Charter*.[2]

When someone raises this type of *Charter* argument at a tribunal hearing, a threshold issue is whether the tribunal has the jurisdiction or legal ability to decide this constitutional matter. If the tribunal concludes that it has this power, it must then answer two questions. First, is the impugned provision inconsistent with the *Charter* provision relied upon? If the answer to this question is yes, a second question must be asked. Is the impugned provision saved by section 1 of the *Charter*? Section 1 recognizes that *Charter* rights are not absolute and must be balanced against other values:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Both questions must be answered before a tribunal can decide whether a statutory provision is inconsistent with the *Charter*.

However, the current legal test for determining jurisdiction lacks clarity. This report considers whether legislative clarification of the power of tribunals to decide a *Charter* challenge would be beneficial.

If legislative reform would be helpful, a decision must be made about the extent to which tribunals should have the power to decide that part of their enabling statute is unconstitutional. The alternative is to leave this power to be exercised only by a court. In addition to these jurisdictional questions, this report addresses two related procedural issues and the public comments received in response to a background paper, Administrative Agencies and the Charter, released for public comment by the Administrative Justice Project in December 2001. As noted in the background paper, there are constitutional issues which can arise at tribunal hearings other than the type of *Charter* determination under discussion here.[3] This report addresses only the ability of a tribunal to decide that a provision in its enabling statute is contrary to the *Charter*.

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2 For example, see the following decisions by the Appeal Division of the Workers Compensation Board: #93-1222, #99-1427 and #2001-0200.

3 Administrative Agencies and the Charter, background paper prepared by the Administrative Justice Project, December 2001, at pp. 2-3. This paper is available at the Project's website: http://www.gov.bc.ca/ajp/rpts/.

CURRENT LAW: A NEED FOR REFORM

The starting point in any analysis of a tribunal's power to make a *Charter* determination is section 52 (1) of the *Constitution Act, 1982*:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to extent of the inconsistency, of no force or effect.

Although the constitution is the supreme law of the land, this section does not tell us what entities have the power to make legal determinations whether a statutory provision contravenes the *Charter*. Clearly the courts can make these determinations. The present issue is whether administrative tribunals should also be able to give direct legal effect to section 52.

In one sense the legal test for whether a tribunal can exercise this *Charter* jurisdiction is straightforward. The Supreme Court of Canada stated in a case named *Cooper* that the test is one of legislative intent:[4]

> *These authorities [Douglas College, Cuddy Chicks and Tétreault-Gadoury] make it clear that no administrative tribunal has an independent source of jurisdiction pursuant to s. 52 (1) of the Constitution Act, 1982. Rather, the essential question facing a court is one of statutory interpretation – has the legislature, in this case Parliament, granted the administrative tribunal through its enabling statute the power to determine questions of law?...*
>
> *If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52 (1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute....*

The power to consider questions of law must go beyond interpreting and applying the tribunal's enabling statute. The additional step has been variously described as a power to address "general questions of law" and "the power to interpret or apply any law necessary to reach its findings".[5]

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[4] *Cooper v. Canada (Canadian Human Rights Commission); Bell v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R 854 at para. 45-46 per La Forest J.

[5] See *Cooper, supra*, para. 55 and *Tétreault - Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at para. 10 per Justice La Forest. See also *Martin v. Nova-Scotia (Workers' Compensation Board)*, 2000 NSCA 126, 192 DLR (4) 611 at para. 93, leave to appeal granted by SCC, June 14, 2001.

The test is one of statutory interpretation. Did the legislature intend the tribunal to have the power to decide general questions of law (and hence have *Charter* jurisdiction)? This statement of the test, however, is deceptively simple. In practice, application of the test is frequently clouded in uncertainty. *Cooper* is itself an example of this uncertainty. Six of the seven judges agreed on the general test; however, two of these judges reached a different conclusion than their colleagues about the result of applying the test in that case. (To make matters even more interesting, Chief Justice Lamer in a strongly worded dissent expressed fundamental misgivings about the test, even though he had previously agreed with it in earlier decisions of the Court.[6])

The reason for this uncertainty is that legislation does not directly address whether a tribunal has jurisdiction to deal with *Charter* challenges. Courts (and others) must therefore surmise this legislative intent. One factor frequently taken into account is "practical considerations [which] may be of assistance in determining the intention of Parliament".[7] These considerations include the institutional competence of the tribunal and issues of adjudicative efficiency.

The practical result is that it is often difficult to predict when the courts will decide that a particular tribunal has *Charter* jurisdiction.[8] Andrew Roman has described the problem as follows:[9]

> *It is now very difficult to determine whether any particular tribunal in any particular situation has jurisdiction to decide Charter issues. That is because...the test for determining this is so vague in content, and so speculative in its application.*

This uncertainty can lengthen and increase the cost of tribunal proceedings (including any related court proceedings).

Since the ability of a tribunal to apply the *Charter* is a question of statutory interpretation, the legislature has the authority to state clearly which (if any) tribunals have the power to apply the *Charter*. This point has been noted by a number of academic writers.

---

6 *Cooper, supra*, para. 7:
> But in my respectful opinion, this exercise is deeply flawed because the premise upon which my colleagues rely – that the intent to confer on tribunals a power to interpret general law in turn implies an intent to confer on tribunals a power to refuse systematically to apply laws which violate the Charter – is suspect.

7 *Cooper, supra* at para. 59.

8 A number of these cases were discussed in the Background Paper.

9 Andrew J. Roman, "Case Comment: *Cooper v. Canada (Human Rights Commission)*" 43 Admin. L.R. (2d) 243.

Responses to the Background Paper

The Administrative Justice Project received several responses to its background paper on this *Charter* issue. All agreed that legislative clarification would be beneficial. Two suggested that although legislative reform would be good, it was not a pressing issue. Most of the responses stressed the need for legal expertise on a tribunal if it is to consider a *Charter* issue in an appropriate way.

The Law Society of British Columbia stated:

> *While the Law Society recognizes that there would be no harm in clarifying the ability of agencies to apply the Charter to their decisions, there is no real suggestion that this is a pressing issue. It is quite unlikely, in any event, that the issue of Charter application by a tribunal will be resolved in any final sense by the tribunal itself. Even if legislative reform is brought to this issue, Courts may well end up deciding the matter on a case by case basis. Again, the Law Society believes that it is important to emphasize that generic legislation on such an issue would be ill-advised. It would be inappropriate to vest power in a tribunal to make decisions about Charter applicability if the tribunal possesses no legal expertise. If reform is desired on this issue, it would be more advisable to legislate the issue by way of a specific provision in each enabling statute.*

In a somewhat similar vein, the British Columbia Council of Administrative Tribunals (BCCAT) noted:

> *The ability to decide Charter questions is not a significant matter for most tribunals. Even for those tribunals for which the issue has arisen, it is not typically seen as a priority issue, and most have been able to successfully deal with the matter.*
>
> *The experience and position of tribunals does however vary on this point. Some view it as a potential problem in that they lack the expertise and infrastructure to effectively handle complex Charter cases. Others consider it an important part of fulfilling their statutory mandate. In general, most tribunals probably prefer to have the ability to exercise this authority where necessary. However, this also raises important questions about which body has the power to order Charter remedies, and the process for involving the Attorney General.*
>
> *The British Columbia Council of Administrative Tribunals would support clarification of this matter by legislation, provided that circumstances and positions of individual tribunals would be adequately considered in any law reform. This is a matter that could be addressed in an Administrative Justice Plan for each tribunal, with the benefit of an Administrative Justice Council, and implemented through legislation as appropriate.*

The Project received responses from two lawyers in private practice. One strongly supported legislative clarification:

> *The ability to consider Charter issues must be codified and must articulate legislative intention clearly -- the legislature ought to follow one of the two Cooper minority opinions -- either all tribunals can consider them, or none do. Tribunals are able to consider certain Charter issues, but in a managed way.*

The other writer referred to uncertainty in the current law and also commented "on the need for more legal expertise on the part of administrative tribunals" and the need to take legal expertise into account when assessing a tribunal's competence to decide *Charter* issues.

Recommendation

The predictive value of the current test for determining whether a tribunal has this type of *Charter* jurisdiction is poor. The consequence is that parties and tribunals expend time and resources addressing this issue. Legislative clarification would eliminate the need to expend these resources and would result in more efficient and less expensive hearings for those using the tribunal.

> **It is therefore recommended that government clarify in legislation which administrative tribunals have jurisdiction to decide that a provision in a tribunal's enabling statute is inconsistent with the *Charter of Rights and Freedoms*. This legislative clarification could be achieved by adding a provision to the *Constitutional Question* Act.**

WHICH TRIBUNALS SHOULD EXERCISE *CHARTER* JURISDICTION?

The background paper, Administrative Agencies and the Charter, set out four options for legislative reform, clarifying which administrative tribunals should exercise this type of *Charter* jurisdiction:

1. All tribunals have jurisdiction.
2. No tribunals have jurisdiction.
3. All tribunals have jurisdiction except for certain specified tribunals.
4. No tribunals have jurisdiction except for certain specified tribunals.

The background paper also discussed criteria which might be used to identify those tribunals which might be expressly enumerated under options 3 or 4.

Responses to the Background Paper

The responses from the Law Society and BCCAT included comments on which tribunals should exercise this type of *Charter* jurisdiction. The Law Society commented that this type of constitutional issue often is ultimately decided in court in any event. It also stressed the importance of legal expertise for any tribunal making this kind of decision. BCCAT said that most tribunals probably would like to have this *Charter* jurisdiction; however, it also commented that some tribunals lack the expertise and infrastructure to handle this type of issue appropriately. Both the Law Society and BCCAT recommended a tribunal-by-tribunal review rather than generic legislation. The importance of legal expertise was referred to by a lawyer in private practice. Another lawyer stated that either all tribunals or no tribunals should have this *Charter* jurisdiction.

Discussion

A fundamental question is whether a tribunal has the institutional capacity to deal with a *Charter* question in an appropriate manner. This point was referred to in the responses received by the Administrative Justice Project and in the cases discussed in the background paper.

Charter questions typically require extensive and sometimes complex legal and factual analysis. As noted earlier, two legal questions must be answered. Is the impugned legislative provision inconsistent with a provision in the *Charter*? If yes, is the legislation nonetheless justified under section 1 of the *Charter*? Both questions usually require an appropriate factual record before the legal issues can be properly answered.

A recent decision of the Supreme Court of Canada regarding a *Charter* decision by the British Columbia Labour Relations Board illustrates the sub-questions which must be addressed under section 1 of the *Charter*:[10]

> *The aim of analysis under s. 1 of the Charter is to determine whether the infringement of a Charter right or freedom can be justified in a free and democratic society. Following the tests elaborated initially in R. v. Oakes, [1986] 1 S.C.R. 103, and subsequently in cases including Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, and Thomson Newspaper, it is incumbent on the respondent and the Attorney General as the parties seeking to uphold the restriction on a Charter freedom to show on a balance of probabilities that such an infringement can be justified. To satisfy this burden, they must demonstrate that the objective sought to be served by the legislative restriction is*

[10] *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 at para. 34 per Cory J. for the Court.

> *of sufficient importance to warrant overriding a constitutionally protected right or freedom. Only a significantly pressing and substantial objective can meet this requirement. They must also demonstrate that the legislative restriction is proportional to the objective sought by the legislature. In determining proportionality, three factors must be examined. First, the measure chosen must be rationally connected to the objective. Second, it must impair the guaranteed right or freedom as little as reasonably possible. And third, there must be proportionality between the importance of the objective and the deleterious effects of the restriction and between the deleterious and salutary effects of the measure. The analysis must be undertaken in the context of labour relations.*

When a legislative provision is challenged under the *Charter*, the Attorney General (on behalf of the government) will in many cases need to lead evidence to inform the tribunal's judgment of whether, for example, the legislative provision reflects "proportionality between the importance of the objective [of the provision] and the deleterious effects of the restriction and between the deleterious and salutary effects of the measure". This evidence can be both extensive and complex.

In those cases where a tribunal decides that a provision in its enabling statute is inconsistent with the *Charter*, it must then decide upon an appropriate remedy. Frequently this will be simply a decision that the provision is inoperative and does not apply to the case before the tribunal. (The decision of an administrative tribunal does not legally apply to other cases in the way that a decision of the British Columbia Supreme Court does.) In some cases, however, this will not produce an appropriate remedy.[11]

A tribunal's institutional capacity to decide *Charter* questions includes factors such as:

- procedures and timelines which allow for adequate consideration of the complex evidentiary and legal questions inherent in this type of *Charter* question;
- use of evidence which is sufficiently reliable to form a basis for concluding that a statutory provision is constitutionally unacceptable;
- subject matter expertise;
- legal expertise.

These issues were explored in the background paper.[12] For tribunals which do not have the necessary institutional capacity (including relevant legal expertise), there can be little doubt that they should not exercise a jurisdiction to decide whether a statutory provision contravenes the *Charter*.

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[11] See the discussion of this matter at page 7 of the background paper.

[12] Pages 8-11.

In those situations where a tribunal may have the institutional competence to decide a *Charter* issue in an appropriate manner, efficiency is a factor which must also be considered.

From the perspective of the parties to a dispute, an argument can be made that it is more efficient to deal with all relevant issues in a single hearing at first instance -- rather than requiring a party to initiate court proceedings either during or after the tribunal hearing. On the other hand, it has also been argued that, since *Charter* issues frequently end in the courts in any event, it makes more sense not to use tribunal time dealing with these complex questions. This argument is particularly strong where a tribunal lacks the institutional competence to deal with a *Charter* issue appropriately. These two sides of the efficiency argument are reflected in *Cooper*.[13]

A second aspect of efficiency is from the perspective of the tribunal itself. Since *Charter* questions are by their nature complex, a power to deal with *Charter* questions could have an adverse impact on a tribunal's efficiency and ability to deal with an often heavy case load in a timely manner. The significance of this factor depends on the frequency and length of *Charter* hearings. For example, the Appeal Division of the Workers' Compensation Board has faced repeated challenges to a provision in the *Workers Compensation Act* dealing with spousal pensions.[14] Since tribunal decisions (unlike a court declaration)[15] are not legally binding on future cases, the issue must be readdressed each time it arises.

Although efficiency is a factor which can sometimes cut both ways, it is generally more efficient not to expend time on a *Charter* challenge at the tribunal hearing. If a party does not otherwise obtain the result desired in the tribunal's decision, the *Charter* issue can subsequently be raised on judicial review or appeal to court[16] from the tribunal's decision.

In addition to institutional capacity and adjudicative efficiency, there is a constitutional issue which should be addressed in any assessment of whether tribunals ought to have jurisdiction to deal with *Charter* challenges to their enabling statutes. The Supreme Court of Canada has ruled that

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13 *Cooper, supra.* at para. 62 per La Forest (for the majority) and at para. 74 per McLachlin J. (dissent).

14 Three of these cases are referred to above in footnote 2.

15 See the discussion below at footnote 18.

16 An appeal to court exists only where it has been created by statute.

it is legally appropriate for at least some tribunals to exercise this jurisdiction. Chief Justice Lamer, however, reached an opposite conclusion by the time he wrote his dissent in *Cooper*:[17]

> *I fear that in seeking to give the fullest possible effect to the Charter's promise of rights-protection, the previous judgements of this Court may have misunderstood and distorted the web of institutional relationships between the legislature, the executive and the judiciary which continue to form the backbone of our constitutional system, even in the post-Charter era. This distortion has been achieved by giving administrative tribunals access to s. 52. But in my opinion, s.52 can only be used by the courts of this country, because the task of declaring invalid legislation enacted by a democratically elected legislature is within the exclusive domain of the judiciary. I should make it very clear at the outset of my reasons that I am not addressing the role of administrative tribunals in relation to s. 24 (1) of the Canadian Charter of Rights and Freedoms.* [emphasis added]

This passage raises the question of what precisely a tribunal does when it decides that a statutory provision is inconsistent with the *Charter*.

Although tribunals do not have the formal ability to grant a declaration of invalidity, Chief Justice Lamer expressed the view in *Cooper* that, for all practical purposes, a tribunal's decision of invalidity had much the same effect as a court declaration:[18]

> *The de facto equivalence between refusals to apply and declarations of invalidity decisively demonstrates that tribunals, when they refuse to apply their enabling legislation under s. 52 of the Constitution Act, 1982, are improperly exercising the role of the courts.*

Part of the rationale for Chief Justice Lamer's position is that a decision by a tribunal that a statutory provision in its enabling statute is inconsistent with the *Charter* will have practical implications beyond the particular case before it. For example, parties may be less likely in the future to pursue or resist a claim which depends on the impugned statutory provision even though the tribunal is not in law bound to follow its earlier decision.[19]

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17 *Supra*, para. 3.

18 *Supra*, para. 19. Superior courts (such as the British Columbia Supreme Court) have the power to grant a declaration that a statutory provision is constitutionally invalid. This declaration becomes part of the general law and must be applied by all tribunals and government, unless the decision is overturned on appeal to a higher court. In contrast, a decision of an administrative tribunal is not "a binding legal precedent" and "is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior courts" (*Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at para. 17 per La Forest J.).

19 See, however, the discussion above at footnote 14.

This judicial disagreement about the significance of a tribunal's decision that a statutory provision is inconsistent with the *Charter* leads to Chief Justice Lamer's broader concern that administrative tribunals are not a constitutionally appropriate forum for addressing the constitutional validity of legislation:[20]

> *The constitutional status of the judiciary, flowing as it does from the separation of powers, requires that certain functions be exclusively exercised by the judicial bodies. Although the judiciary certainly does not have an interpretive monopoly over questions of law, in my opinion, it must have exclusive jurisdiction over challenges to the validity of legislation under the Constitution of Canada, and particularly the Charter. The reason is that only courts have the requisite independence to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to declare invalid an enactment of the legislature. Mere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members, while the tribunal is in existence, usually serve at the pleasure of the government of the day, and whose decisions in some circumstances are properly governed by guidelines established by the executive branch of government, are not suited to this task. I must stress again, however, that questions of this sort relate to s. 52 of the Constitution Act, 1982; I do not address s. 24 (1) of the Charter.*

Chief Justice Lamer's key concern is that only the courts have the necessary independence from government to be entrusted with the weighty responsibility of deciding whether a particular statutory provision is unconstitutional.

None of the other judges in *Cooper* expressed agreement with Chief Justice Lamer's concerns. In particular, Justice McLachlin (as she then was) vigorously disagreed with his views. She rejected the view that tribunals (or at least some of them) should not have the power to make decisions on *Charter* validity:[21]

> *Two related principles of general application governed the question before us. The first is the general rule that all decision-making tribunals, be they courts or administrative tribunals, are bound to apply the law of the land. In doing so, they apply all the law of the land, including the Charter…Section 52 of the Constitution Act, 1982 proclaims the Constitution as the "supreme law" of Canada. Citizens have the same right to expect that it will be followed and applied by the administrative arm of government as by legislators, bureaucrats and the police. If the state sets up an institution to exercise power over people, then the people may properly expect that that institution will apply the Charter.*
>
> ...
>
> *The second principle of general application to the question before us is this: a tribunal's ruling that a law is inconsistent with the Charter is nothing more, in the*

[20] *Cooper, supra*, para. 13.

[21] *Cooper, supra*, paras. 78 and 83.

> *final analysis, than a case of applying the law of the land – including the most fundamental law of the land, the Constitution....Laws are not struck down by judicial fiat, but by operation of the Charter and s. 52 of the Constitution Act, 1982....The fact that invalidation of laws under the Charter is linked to inconsistency rather than the action of a particular court, undercuts the suggestion that striking down laws under the Charter is the prerogative of a particular court.*

More recently, Chief Justice McLachlin (writing for a unanimous court) commented on the place of administrative tribunals in the Canadian constitutional framework:[22]

> *...tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of the government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.*

This passage shows clear similarities to parts of Chief Justice Lamer's dissent in *Cooper* (quoted above).

The courts' pronouncements on this point provide no definitive guidance – apart from judicial acceptance that a tribunal can entertain and rule on *Charter* challenges to its empowering statute if the legislature intended to confer that power on the tribunal. But the question remains: What policy should inform legislative action in this area?

Recommendations

The first decision is whether to adopt the all-or-nothing approach to giving tribunals the power to decide *Charter* challenges. Both the Law Society and BCCAT recommended against such an approach. Giving all tribunals this *Charter* jurisdiction would result in a number of tribunals exercising the jurisdiction without the necessary institutional competence to do so appropriately. The only solution would be to alter the way in which these tribunals operate to ensure they had the necessary institutional capacity. Apart from resourcing and other issues, such an approach would in some cases result in a fundamental change to the nature of the tribunal and would lessen its effectiveness in carrying out its broader legislative mandate.

A general rejection of this type of *Charter* jurisdiction for tribunals would be consistent with the view that it is constitutionally inappropriate for administrative tribunals to ignore a provision in their empowering act on the basis that it offends against the *Charter*. It would, however, result in a

tribunal such as the Labour Relations Board not being able to deal with a *Charter* challenge during the course of hearing. The all-or-nothing approach does not appear to be appropriate.

The other reform options involve giving *Charter* jurisdiction to some but not all tribunals, which raises the question: What criteria should inform the decision about which tribunals should exercise this jurisdiction? Institutional capacity is critical. Without it, no tribunal should have this type of *Charter* jurisdiction.

To the extent that it provides assistance, adjudicative efficiency should also be considered. When one takes into account both institutional capacity and adjudicative efficiency, the most appropriate reform is for no tribunal to exercise this *Charter* jurisdiction except perhaps for a tribunal such as the Labour Relations Board.

The Labour Relations Board stands out from other tribunals in its institutional capacity to address in particular the section 1 analysis[23] required in any *Charter* challenge. For example, it has legal expertise, subject matter expertise and procedures and timelines which allow for adequate consideration of the complex evidentiary and legal questions inherent in this type of *Charter* question. Furthermore, apart from the board's own significant institutional resources, parties to a *Charter* challenge before the board typically have the legal and financial resources to address in a meaningful way the various issues which must be dealt with in a *Charter* challenge.

It is therefore recommended that:

> **No administrative tribunals have jurisdiction to determine that provisions in their enabling statutes are contrary to the *Charter* unless this jurisdiction is expressly enumerated.**
>
> **The list of enumerated tribunals with this type of *Charter* jurisdiction be strictly limited.**

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22 *Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, at para. 32.

23 See the discussion above at footnote 10.

PROCEDURAL REFORM

There are a number of ancillary procedural issues which could be addressed by legislation – apart from any reform on the substantive question of which tribunals should exercise this *Charter* jurisdiction. The background paper set out the following procedural options:

- For tribunals with *Charter* jurisdiction
  - Give the tribunal a statutory discretion to decline exercising the jurisdiction and to refer the matter to court.
  - Amend the *Constitutional Question Act* to remove any possible doubt that notice must be given to the Attorney General in those cases where there is a *Charter* challenge to the validity of legislation.
- For tribunals without *Charter* jurisdiction
  - Enact legislation allowing the tribunal to refer a *Charter* matter to court for determination before the tribunal hears the case before it.
  - Maintain the status quo concerning the availability of judicial review before the tribunal has heard the case.

Power to Refer to Court

The background paper asked whether tribunals, with or without the power to entertain a *Charter* challenge, should have the power to refer a *Charter* question to court for determination prior to completion of the tribunal's hearing. There is little to be said for giving such a power to tribunals that do not have this type of *Charter* jurisdiction. It would delay completion of the tribunal hearing, perhaps for a significant time. The question is not so straightforward, however, for a tribunal such as the Labour Relations Board with power to hear a *Charter* challenge to a provision in its enabling statute.

The recommendations in this report reflect a view that, for a tribunal such as the Labour Relations Board, it is usually more appropriate for a *Charter* challenge to be addressed at the hearing before a tribunal. It is difficult, however, to envisage all future circumstances. Cases may arise where it is clear to a tribunal that the most efficient and appropriate way of resolving a particular *Charter* question is to leave it for resolution by the court, even though the tribunal has a general power to decide the issue. This could be achieved by giving the tribunal a power to refer the matter to court. The tribunal's hearing would be adjourned pending the outcome of the court reference. An alternative would be simply to give the tribunal a power to decline the *Charter* jurisdiction. The result would be that a party not otherwise content with the tribunal's final decision could seek resolution of the *Charter* issue by judicial review from the tribunal's final

decision.[24] (This situation would parallel that of tribunals with no jurisdiction to deal with a *Charter* challenge.)

Giving a tribunal the discretion to refer a *Charter* challenge to court would allow it to deal with exceptional cases where the tribunal concluded that it should not exercise its power to make a *Charter* decision.[25] A disadvantage of granting such discretion is that it adds another issue for argument and decision by the tribunal. On balance, however, the preferable route is for a tribunal such as the Labour Relations Board to have the discretion to refer a *Charter* challenge to court for a decision.

It is recommended that a tribunal with jurisdiction to decide this type of *Charter* issue have a discretionary power to refer the *Charter* question to the British Columbia Supreme Court.

Notice under the *Constitutional Question Act*

The *Constitutional Question Act* requires that the Attorney General be given notice when the validity or applicability of an enactment is challenged in "a cause, matter or other proceeding".[26] The purpose of the notice is to give the Attorney General (on behalf of the government) an opportunity to defend the validity of the provincial legislation being challenged. Although a decision of invalidity by an administrative tribunal does not have the strict legal effect of a declaration of invalidity by a court, it nonetheless can have serious implications. The wording in the *Constitutional Question Act* is broad enough to include tribunal proceedings; however, it should be amended to remove any lack of clarity that it applies to both court and tribunal proceedings.

It is recommended that the *Constitutional Question Act* be amended to remove any possible doubt that it applies to tribunal hearings in which a constitutional question is raised.

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24 In those cases where there is a right of appeal to court, the *Charter* challenge could be raised by that route. A party could also attempt to rely on the somewhat limited availability of judicial review before a tribunal has heard the case.

25 *Cf.* M.C. Crane, "Administrative tribunals, *Charter* challenges, and the "Web of institutional relationships"" (1998) 61 *Saskatchewan Law Review* 495 at p. 507; and John M. Evans, "Administrative tribunals and *Charter* challenges: Jurisdiction, discretion and relief" (1997) 10 *CJALP* 355 at p. 364.

26 R.S.B.C. 1996, c. 68, s. 8. Notice must be given to the attorneys general of both British Columbia and Canada.

CONCLUSIONS AND RECOMMENDATIONS

Charter challenges to a tribunal's enabling statute do not arise frequently at tribunal hearings. Nonetheless legislative clarification of which tribunals have this type of *Charter* jurisdiction would be beneficial. It would provide clarity and certainty around this aspect of a tribunal's jurisdiction and powers. The result would be a more efficient use of time and resources by both tribunals and the parties appearing before them.

The appropriate legislative reform is a general rule that no tribunal has this power unless expressly given it by the legislature. In addition, the two procedural reforms recommended in this report would help optimize the way in which this type of *Charter* issue is resolved. The result of these reforms would be a more appropriate resolution of *Charter* challenges to a tribunal's empowering statute than presently occurs.

As informal and less costly alternatives to the courts, administrative tribunals are not necessarily well-suited to deciding complex constitutional questions, including those that arise under the *Charter*. In order to contain the costs of administrative proceedings, eliminate uncertainties and delays and ensure that administrative processes remain open and accessible to people who may not be represented by legal counsel, legislative amendments are required to clarify which administrative tribunals have jurisdiction to hear a *Charter* challenge. Accordingly, it is recommended that:

Government clarify in legislation which administrative tribunals have jurisdiction to decide that a provision in the tribunal's enabling statute is inconsistent with the *Charter of Rights and Freedoms*. This legislative clarification could be achieved by adding a provision to the *Constitutional Question* Act.

No administrative tribunals have jurisdiction to determine that provisions in their enabling statutes are contrary to the *Charter* unless this jurisdiction is expressly enumerated.

The list of enumerated tribunals with this type of *Charter* jurisdiction be strictly limited.

A tribunal with jurisdiction to decide this type of *Charter* issue have a discretionary power to refer the *Charter* question to the British Columbia Supreme Court.

The *Constitutional Question Act* be amended to remove any possible doubt that it applies to tribunal hearings in which a constitutional question is raised.

DISPUTE RESOLUTION

Report and Recommendations

Prepared by

Administrative Justice Project

for the

Attorney General of British Columbia

July 2002

FOREWORD

The following report was prepared for British Columbia's Administrative Justice Project. Established in July 2001, the Project is part of the government's commitment to ensure that the administrative justice system is accessible, efficient, fair and affordable.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. It has also set forth a series of recommendations to address the most significant challenges facing the system today.

This report discusses issues related to the range of dispute resolution processes available to, and appropriate for, administrative tribunals. The phrase "dispute resolution" can be broadly construed as applying to all forms of dispute resolution, including arbitration, litigation, negotiation, mediation or administrative review. Within the context of this report, "dispute resolution" refers more narrowly to consensual dispute resolution.

Although most administrative tribunals were intended to offer an alternative to formal, complicated and costly court processes, many are experiencing problems that parallel those in the court system. In both forums, cost, delay and procedural complexity can impede public access. The adoption of processes for the early, consensual resolution of disputes has come to be seen as a significant component in enhancing public access to justice and in improving the efficiency of administrative tribunals. There are clear opportunities for administrative tribunals to consider adopting consensual dispute resolution processes and, where necessary and appropriate, statutory provisions should be enacted to ensure that tribunals can take advantage of these opportunities.

The analysis and recommendations presented here support the Administrative Justice Project's White Paper. Copies of the White Paper, other background papers, reports and further information on the Project are available through the Internet at: www.gov.bc.ca/ajp.

Interested readers are invited to provide comments on the White Paper and related reports before November 15, 2002 by:

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Table of Contents

Introduction 1
"ADR" and the Dispute Resolution Continuum 2
Types of Dispute Resolution Processes 2
Designing Dispute Resolution Systems 4
Collaborative Problem Solving 4
Managing to Resolution – Early Resolution 5
Integrated and Comprehensive Dispute Resolution Policy Umbrella 5
Need for Legislated Dispute Resolution Powers 6
Benefits of Consensual Dispute Resolution Processes 7
Where Consensual Dispute Resolution Processes may not be Appropriate 7
Key Issues 8
Statutory Limitations 9
Power Imbalances 9
Appointment of Neutrals 10
Selecting Cases for Alternative Dispute Resolution 11
Confidentiality 12
Enforcement of Agreements 13
Legislative Provisions 14
System Wide Coordination 15
Recommendations 15

INTRODUCTION

One of the primary mandates of the administrative justice system is to provide a less formal, complex and costly alternative to the court system. Ironically, over the years, administrative tribunals have come to experience problems that parallel those in the court system, where costs, delays and procedural complexities too often serve to impede public access. In the civil justice system, these problems have been the subject of extensive study and comment – pointing to the need for a much greater emphasis on early, consensual dispute resolution. There is an almost universal conclusion that this is the best way to enhance public access to justice.[1]

[1] The main reports are: Access to Justice: The Report of the Justice Reform Committee, B.C. (1988); Civil Justice Review, Ontario (1996); Systems of Civil Justice Task Force Report, Canadian Bar Association (1996); Lord Woolf's Report on Access to Justice, England (1996) (http://www.lcd.gov.uk/civil/finalfr.htm); Managing Justice: A Review of the Federal Civil Justice System, Australian Law Reform Commission (1999) (http://www.austlii.edu.au/au/other/alrc/publications/reports/89/index.html).

"ADR" and the Dispute Resolution Continuum

The term "ADR" was originally an abbreviation for "alternative dispute resolution". In recent years, however, this phrase has been replaced by newer terms such as "appropriate dispute resolution" or simply "dispute resolution". The changing terminology reflects a growing acceptance of these processes – and a growing recognition that they are not only useful as alternatives to adjudication. Rather, "ADR" processes are part of a continuum of options for resolving disputes, ranging from low cost, straightforward processes such as negotiation to high cost, complex processes such as adjudication, which is seen as a valued but last resort.

In this report, the term "dispute resolution process" refers to the full range of options on the continuum, from which tribunals can choose the most appropriate process for resolving individual cases. The term "consensual" is used to describe dispute resolution processes that do not reflect the traditional adjudicative model (defined below).

Types of Dispute Resolution Processes

Mediation is one of the best known, and most commonly used, forms of consensual dispute resolution. In this process, a neutral, impartial third party tries to facilitate a settlement between disputing parties and does not have the authority to impose a binding decision.

There are two common approaches to mediation:

> ***Interest-based*** –The mediator encourages the parties to identify their needs, desires, concerns, fears and hopes and to craft an outcome which addresses as many of their underlying needs and interests as possible. The mediator oversees the process and is not responsible for the outcome. (This is the approach preferred by the Ministry of Attorney General's Dispute Resolution Office and reflected in the ministry's Alternative Dispute Resolution Policy,[2] based on a belief that parties are more likely to be satisfied with resolutions based on their interests.)
>
> ***Rights-based or evaluative*** –The mediator assumes the parties want and need direction on the appropriate grounds for settlement and takes a more active role in determining the outcome. The mediator frames the dispute in terms of opposing rights and obligations or

[2] http://www.ag.gov.bc.ca/dro/adr_policy_statement.htm.

looks to the rights the parties would have in court as a guideline or benchmark for settlement.

Negotiation is any form of unfacilitated communication in which opposing parties discuss potential steps to resolve a dispute. It can occur directly between the parties or indirectly through agents on behalf of the parties, such as lawyers.

Conciliation is difficult to define because the word is used to describe very different types of processes. For example it has been defined as "a procedure like mediation but where the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve an agreed settlement".[3] Another source defines conciliation as a process "where a neutral third party serves as an intermediary or messenger between disputing parties who are unwilling to meet. This term is often used interchangeably with mediation and facilitation".[4]

Facilitation includes techniques to improve the flow of information between parties to a dispute or in decision making.

Negotiated rulemaking or "reg-neg" brings together representatives of various stakeholders to negotiate the body of a proposed rule or regulation. This method is used extensively in the U.S.

Shared decision *making* is a consensus-based approach that brings together those who have authority to make a decision and those who will be affected by the decision. Both parties are jointly empowered to seek an outcome that accommodates the interests of all concerned.[5]

Neutral evaluation is a process in which parties obtain from an experienced (and possibly expert) neutral third party a non-binding, reasoned evaluation of their case on its merits. The opinion or assessment is expected to have persuasive value, especially because the neutral third party is jointly selected.

Mediation-arbitration or "med-arb" starts as a traditional mediation by a neutral third party. If the mediation does not result in a resolution, the third party becomes an arbitrator and makes a binding decision.

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3 The Lord Chancellor's Department, Consultation Paper: General Pre-action Protocol, October, 2001 http://www.lcd.gov.uk/consult/preaction/preaction.htm.

4 Pirie, *Alternate Dispute Resolution: Skills, Science, and the Law*, (2000), p. 48.

Arbitration is a form of adjudication. Disputes are submitted to a neutral adjudicator through the presentation of evidence and arguments and the arbitrator's ruling is binding. Arbitration is generally a private, voluntary method of adjudication. However, government sometimes requires that certain disputes be submitted to arbitration (e.g. disputes under the *Residential Tenancy Act*). Also, a contract may provide that disputes will be resolved by arbitration rather than litigation.

Adjudication refers to any dispute resolution process in which a neutral third party hears each party's evidence and arguments and renders a binding decision. This includes arbitration and litigation.[6]

Case management is not usually considered a dispute resolution process, but it is closely linked to the use of consensual dispute resolution processes. Case management systems promote early and less costly dispute resolution. They often incorporate, early in the process, a method to assess the potential for, and make referrals to, non-binding dispute resolution approaches.

Dispute resolution systems are often designed to be integrated with case management. Many jurisdictions use both to enhance access to justice and respond to concerns about the cost of administering dispute resolution processes.

Settlement conferences, case conferences and pre-trial conferences are case management processes involving an informal dialogue between a tribunal member or members, legal counsel and/or the parties, leading up to a hearing. Objectives can include settling the dispute, expediting the disposition of the action, discouraging wasteful pre-trial activities and improving the hearing's efficiency through more thorough preparation.

DESIGNING DISPUTE RESOLUTION SYSTEMS

Collaborative Problem Solving

Most existing public dispute resolution systems are established on a rights-based, essentially adversarial model, mirroring the court system. Experience in a wide variety of settings has demonstrated that interest-based approaches – with their emphasis on collaborative problem solving and facilitated negotiation – will provide simpler, less expensive, "user-friendly" dispute

[5] Darling, ed, Thinking Strategically: Developing Systems to Resolve Conflict (1998).

resolution for many cases. This is not to suggest, however, that mediation - or any other form of collaborative resolution - is universally appropriate or able to displace rights-based adjudicative processes. Rather, consensual approaches are an adjunct to adjudicative processes.

Managing to Resolution – Early Resolution

In the court system, the traditional approach has been to place all disputes on a procedural track aimed towards adjudication, relying on the fact that most of them (about 97%) will resolve before they ever reach the hearing stage. In other words, even though we know that most court cases will settle, the system still manages and administers them as if they will be adjudicated.

Many tribunals also manage to adjudication and, while the rate of settlement is lower than in the courts, this may be because the tribunal process has fewer incentives to settle or because the tribunal's culture is not settlement focused. The result can be that some tribunals deal with a majority of cases by adjudication.

Another approach is to start from, and build on, the goal of settling most or many cases. Systems can then be designed and policy created to support settlement at every stage of the case. This kind of approach could allow tribunals to expressly manage for or towards resolution, facilitating earlier settlements.

Integrated and Comprehensive Dispute Resolution Policy Umbrella

Tribunals considering collaborative dispute resolution need to do more than simply add a mediation (or other mechanism) box to their procedural flowchart. As one commentator stated:

> *Bringing ADR into administrative law involves more than just simply engrafting upon the mandate of an agency additional statutory powers authorizing mediation and arbitration. It requires thinking deeply about regulation, government, law and public administration.*[7]

Tribunals should consider policies that support settlement at every stage of the case. This means supporting dispute resolution – not only as a final objective, but at every level and stage in the process, in a consensual fashion. This may mean, for example, training regulatory staff to use a consensual approach to solving problems in their day-to-day work environment; training all tribunal staff who interact with parties to work in a consensual fashion; or using case

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6 Pirie, p. 47.

7 Reid, Alan, "Seeing Regulation Differently: An ADR Model of Policy Formulation, Implementation and Enforcement" (1995), p. 1.

management tools to identify, early in the process, cases appropriate for non-adjudicative resolution.

Need for Legislated Dispute Resolution Powers

The use of consensual dispute resolution by administrative tribunals is relatively new. As a result, many tribunals do not have express authority in their statutory powers to engage in these types of practices. Of the many statutes governing tribunals, only four refer specifically to mediation or dispute resolution[8]. Where provisions do exist, tribunals do not always have a comprehensive dispute resolution system and dispute resolution powers do not have consistent wording.

In some cases, tribunals have developed consensual dispute resolution processes regardless of the absence of specific enabling powers in their legislation. For example, the British Columbia Utilities Commission has adopted procedures such as technical workshops, pre-hearing conferences and discussion groups to encourage open and flexible discussions among participants in regulatory matters. The commission "also uses ADR to seek agreement among participants about regulatory matters" [9] before it.

Still, there are a number of reasons why it makes good sense to include dispute resolution powers in legislation. First, there is no consensus on whether the ability to engage in dispute resolution processes is a power that must be conferred by statute – or a procedure, which does not require express statutory authority. Tribunals, advocates and the public need certainty about this issue in order to engage in dispute resolution design creatively and confidently.

Second, conferring specific power on one tribunal may compel a court to conclude that silence in another tribunal's governing statute means that such a power is not implied.

Third, specific legislative provisions will provide some consistency on key issues and can serve an educative function, highlighting and legitimizing consensual dispute resolution tools and systems.

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8 *Children's Commission Act*, R.S.B.C. 1996, c. 11, *Human Rights Code*, R.S.B.C., 1996, c. 210, *Labour Relations Code*, R.S.B.C., 1996, c 244; *Residential Tenancy Act*, R.S.B.C. c. 406.

9 Utilities Commission, "A Participants Guide to the British Columbia Utilities Commission, October 1996 (Revised February, 1999).

Benefits of Consensual Dispute Resolution Processes

Administrative tribunals may look to dispute resolution to address a variety of concerns including process dissatisfaction, delay, complexity, cost and lack of accessibility. The potential benefits of using consensual, non-binding dispute resolution processes include:

- simpler, less expensive and more timely dispute resolution;
- better, more enduring resolutions - since parties have the freedom to explore non-traditional and creative solutions that meet their individual needs;
- increased satisfaction with dispute resolution processes, even among parties who 'lose' and those who were not initially in favour of participating;
- a strong likelihood of settlement, even where parties are initially unwilling to participate in a consensual process;
- fewer enforcement problems, compared to decisions imposed by an adjudicator.

Consensual dispute resolution processes may be particularly well suited to an administrative justice system which aims to be accessible, fair, informal, proportionate, efficient and affordable.

Where Consensual Dispute Resolution Processes may not be Appropriate

Although there is scope for most tribunals to use consensual dispute resolution to some extent, certain types of disputes do not lend themselves to such processes. These types of disputes will vary depending on a range of factors and circumstances, but may include disputes in which:

The dispute is over a decision where a statutory decision maker had no discretion. In these cases, there will be no negotiable issue and, therefore, no room for consensual dispute resolution.

A legal precedent is needed to govern similar cases in the future. In these cases, consensual dispute resolution processes may settle the dispute but they cannot create a precedent on which the tribunal can base future decisions.

An issue of law, public policy or interpretation needs to be clarified on the record. As in cases where a precedent is sought, an adjudicative process may be required.

Public access or participation in the decision or resolution is desirable and cannot be accomplished in the non-adjudicative process. It should be noted, however, that consensual dispute resolution has been very successful in multi-stakeholder processes.

People who are not parties to the dispute might be prejudiced by the outcome. This possibility also exists in disputes resolved through adjudication and there may be more scope within a consensual process to consider the interests of others affected by the outcome.

The constitutional validity of an act or law is challenged. Obviously, a tribunal would not submit constitutional questions to consensual decision making. However, consensual discussions, by focusing on the parties' underlying interests, can sometimes forestall constitutional or other challenges when they are being used in a tactical way.

The case is genuinely frivolous or opportunistic or a party is acting in bad faith. In these cases, tribunals will not want to waste resources, particularly if the hearing process allows for summary determination and dismissal.

There is fear of violence between the parties. It is not always safe to bring disputing parties together and, in some cases, these types of disputes might not be appropriate for consensual resolution. There are, however, ways of conducting consensual processes without having the parties meet face to face.

A final note on the use of consensual processes in the tribunal context: Tribunals that hear appeals from statutory decision makers should give careful consideration to whether or when consensual processes are appropriate for them. In some cases, problems may arise when statutory decision makers participate in particular types of consensual processes on appeals of their own decisions. For example, such participation can undermine the authority of a regulatory scheme, cause undue delay or create too much uncertainty about the finality of the first-level decision.

In this context it is critical that statutory decision makers – and staff making decisions in the first instance – are trained and empowered to engage in consensual decision making. This will improve the quality of and satisfaction with their decisions and so reduce the number of cases that go to a tribunal on appeal.

KEY ISSUES

Tribunals considering consensual dispute resolution must first consider a number of key issues. Many can be dealt with in rules and procedures, while others require statutory authority.

Discussion of these issues raises many of the typical concerns expressed about the use of consensual processes in the tribunal setting.

Statutory Limitations

The legislation governing many tribunals limits possible outcomes. For example, it may require tribunals to reflect broad statutory objectives, to conform to statutory standards or to act in the public interest. The *Human Rights Code* lists a number of statutory objectives, including preventing discrimination and promoting a climate of understanding and mutual respect. Health licensing regulations, such as those under the *Community Care Facility Act*, require adherence to particular standards.

The presence of such objectives or standards raises two important questions. Should settlements have to conform to the statutory objectives, standards or public interest goals of the tribunal's governing legislation and, if so, to what degree will this undermine the consensual approach by interfering with the parties' freedom to craft their own resolution?

These questions often arise in the course of mediation and can be addressed in a number of different ways.

First, legislation can provide that a tribunal must approve all settlements. This is the approach taken by the Ontario Human Rights Commission and the British Columbia Utilities Commission where settlements are reviewed to ensure they reflect the statutory mandate of the tribunal. Second, the mediator can be required to take a more rights-based or evaluative approach guiding the parties to a settlement that fits within certain parameters.

These two approaches often go hand in hand. If settlements must meet statutory requirements, it makes sense to at least ensure that parties are aware of those requirements, as well as the consequences of crafting an agreement that falls outside their parameters.

Power Imbalances

Some tribunals have expressed concern about consensual dispute resolution in cases where one party has significantly more power than the other. However, all disputes are characterized by some form of power imbalance. Power imbalances arise in many different circumstances including when parties have unequal resources or when one party is more interested in settling.

Power imbalances may also be inherent in some relationships, such as those between an employer and an employee and a landlord and a tenant.

Because power imbalances are so common, and can shift during the course of a dispute, it is difficult and, to a certain extent, unnecessary to try to screen out categories of cases where power imbalances exist. Instead, experienced and properly trained mediators can work to balance power and the process itself can be designed to address power imbalances through, for example:

- providing information to participants so everyone has a clear understanding of the process;
- providing a "cooling off" period after a settlement is reached, giving the parties time to consider the agreement before they commit themselves to it;
- allowing parties to opt out of the process without penalty;
- requiring or encouraging parties to get independent legal advice on settlements;
- providing that agencies must approve settlements.

Appointment of Neutrals

The term "neutral" is used to describe the person appointed to assist the parties in resolving their dispute. There are at least four sources of neutrals for tribunals using consensual dispute resolution processes: tribunal members, staff, contractors or neutrals whose services are shared with other tribunals. From whatever source neutrals are drawn, it is important that they be properly trained and that the parties understand the differences between the consensual dispute resolution process and the adjudicative work of the tribunal.

Tribunal members – These individuals may have subject matter expertise and be especially aware of the tribunal's statutory objectives. However, acting as a neutral requires equally specialized skills and training which many tribunal members may not have. If mediating is an important part of a tribunal's process, policy could require that a certain number of tribunal members be trained mediators.

Even if they are not involved directly in mediation, all tribunal members should have some conflict resolution training. Generally, board members who act as neutrals should be barred from sitting as adjudicators if the matter does not settle. This is the approach taken by the Ontario *Statutory Powers and Procedures Act* (s. 4.8(5)). Exceptions may apply in processes such as med-arb, where the neutral is intended to later become an arbitrator or in cases where the parties consent.

Staff – Tribunals with sufficient numbers of cases referred to consensual processes could consider hiring specialized staff to act as neutrals. They would develop subject matter expertise over time while developing their skill as neutrals. Whether or not staff are exclusively dedicated to serving as neutrals (and they need not be), tribunals must take careful steps to separate their adjudicative and non-adjudicative functions. Particular care is needed to protect information gathered through consensual dispute resolution processes from spilling over into the adjudicative side of the tribunal without the prior consent of all the parties.

Contractors – For tribunals with only occasional need for neutrals, contracting is a viable option. It may be more difficult to find contracted neutrals with subject matter specialty and knowledge of the agency, but these types of expertise can be developed by using individuals on a regular basis. Contractors can be more expensive but, if they are not required frequently, the cost may not be prohibitive. Tribunals can also rely on established rosters, where appropriate, or develop their own rosters.

Shared services - Another possibility is for groups of agencies to employ or retain neutrals such as mediators and share their services. This can work particularly well for agencies that work in similar sectors or with similar subject matters.

Selecting Cases for Alternative Dispute Resolution

There are a number of ways in which tribunals can determine which cases are resolved through consensual processes. Four approaches are described below.

Voluntary – In a purely voluntary system, the parties to a dispute choose whether to use a consensual process. In many cases, this approach does not attract sufficient participants to have a measurable impact.

Mandatory – In a mandatory regime, there is a presumption that the parties must attempt to settle through a consensual process before engaging the adjudicative system. Studies have shown that mandatory mediation produces settlement and satisfaction rates comparable to those achieved through voluntary mediation. Mandatory systems may use different degrees of coercion and may include broad exemptions or opting-out provisions. It should be noted that mandating participation in case management processes can be a highly effective way to streamline the tribunal process.

Mandatory by order of administrative tribunal – Administrative tribunals can be given the power to order parties to mediation or other dispute resolution processes. This type of power fits well with a closely case managed system where the tribunal provides oversight and direction for each case.

Party driven – With this approach, one party to a dispute can compel the other(s) to take part in a consensual process. Unique to British Columbia, this "Notice to Mediate" process is available for most civil, non-family actions in Supreme Court. While it has not been used in the administrative justice content, it could provide a viable alternative for those tribunals wanting to go beyond a voluntary process without embracing a fully mandatory model.

Confidentiality

Confidentiality is the cornerstone of certain consensual dispute resolution processes such as mediation. Parties are more likely to engage in a frank discussion of their interests - and be open to considering a range of solutions - if they can be sure that the information shared will not become evidence in an adjudicative proceeding. Many jurisdictions address this matter through legislation with particular attention to the following key issues:

Compellability – Under a typical provision, the neutral and the parties cannot be compelled to give evidence, in any later proceedings, about what happened in the consensual process.

Non-Disclosure – Confidentiality provisions usually prevent the disclosure – in any other proceedings – of information and documents prepared for or used in a consensual dispute resolution process.

Exceptions – Many confidentiality provisions are subject to a number of exceptions, including:

- **Waivers** – There are different approaches to when and how confidentiality can be waived, including by the consent of all involved parties.
- **Proceedings to enforce agreements** – Confidentiality provisions should not apply in proceedings to enforce, amend or set aside an agreement reached through a collaborative process.
- **Pre-existing information** – The consensual process must not be used to shield information from disclosure in later proceedings - if that information would have been subject to disclosure in the absence of a consensual process. This information is often referred to as "otherwise discoverable".
- **Crime** – Some provisions allow participants to disclose information about crimes or threats of crime.

Freedom of Information - All information held by provincial government bodies is subject to the *Freedom of Information and Protection of Privacy Act*. This includes information produced by or for a consensual dispute resolution process. Statutory confidentiality provisions cannot protect information from disclosure under the Act, unless the statute expressly states that the Act does not apply. In addition, 10 types of exemptions are provided for under the Act, including exemptions that prohibit disclosures harmful to: the financial or economic interests of a public body, the business in interests of a third party, or personal privacy.

Although information released under the Act may become public, it will continue to be subject to any non-compellability and non-disclosure provisions in the legislation. In other words, just because information is released to a person or organization under the Act, that does not mean it can be used in any other process.

Enforcement of Agreements

Consensual dispute resolution processes are non-binding in the sense that a resolution will not be imposed on the parties. However, parties engaged in such processes often come to agreement about how to resolve their dispute and such agreements then become binding on the parties. There are a number of ways in which these agreements can be monitored or enforced:

Parties may withdraw the case – If a tribunal does not have a legislated mandate to oversee or record settlements, parties who have reached agreement can simply withdraw their case from the tribunal's process. The disadvantage is that they have no recourse if the agreement is breached and must rely instead on one another's good faith.

Parties may file terms of settlement with the tribunal – Filing provides the tribunal with information on the settlement that may be needed for reporting purposes and which allows the tribunal to close the case. Filing may also allow the parties to take advantage of the tribunal's enforcement powers. For example, under s. 29(2) of the British Columbia *Human Rights Code*, parties must provide their settlements to the Human Rights Commission.

Tribunals may issue an order – Settlement terms reflected in a tribunal order are subject to any enforcement mechanisms available under the governing legislation. For example, under the *Human Rights Code*, if the terms of an agreement have been provided to the Human Rights Commission, a party alleging a breach may file the settlement agreement with the chair of the

[10] For example, see section 40(3) of the *Human Rights Code*.

Human Rights Tribunal. The tribunal can then enforce the agreement as if it were a tribunal order.

Tribunal approval – If a tribunal has a public interest mandate or if the settlement must conform to statutory objectives, legislation can require that the tribunal approve all settlements before they are final. Approval can be issued directly or after a brief hearing. The Utilities Commission, for example, will reject any settlement that does not reflect the public interest.

LEGISLATIVE PROVISIONS

Every administrative tribunal should consider how a full spectrum of dispute resolution processes could improve the quality and efficiency of its work. To support this, the following legislative provisions would be required:

Power to engage in dispute resolution processes – This central provision would empower tribunals to use consensual dispute resolution processes. It would enable rules that allow a range of models – from fully voluntary to fully mandatory – and a range of processes, including mediation and case management.

Confidentiality and compellability – Compellability provisions would protect parties, including neutrals, from being compelled to give evidence in any future proceedings, unless confidentiality was waived in writing by all parties. Confidentiality provisions should, at minimum, prevent parties from disclosing, in any future proceedings, material prepared for or disclosed in the consensual process – unless all parties have consented in writing. Confidentiality provisions should also be subject to some or all of the exemptions discussed above.

The two preceding provisions are essential. Two further provisions should also be considered:

Selecting a neutral – Legislation could include a provision allowing tribunals to appoint a member, or any other person, to act as a neutral – provided that person does not participate in further proceedings unless specifically provided for in the rules governing the process.

Enforcement – Legislation could address when settlements must be reviewed and approved by the tribunal and whether or not the settlement needs to be reflected in an order of the tribunal.

SYSTEM WIDE COORDINATION

The foregoing discussion illustrates that many of the issues related to expanding the use of consensual dispute resolution are not legislative. Accordingly, legislation will not provide guidance on many of the critical issues facing tribunals in this respect.

The Ministry of Attorney General's Dispute Resolution Office has recommended that "consistent expert advice be available to all tribunals so that they have an opportunity to consider all the options and are provided with the tools to tailor the process to their specific needs". Centralized advice on such matters as selecting a neutral, designing a suitable process and selecting cases for consensual resolution will help bring a principled consistency to these matters across British Columbia.

RECOMMENDATIONS

Dispute resolution practices, other than formal adjudication, have been shown to be effective in the courts and in the few administrative tribunals where they have been tested. Better use of these practices will enhance public access to justice and improve the efficiency of administrative tribunals. Accordingly, it is recommended that government encourage broader use of consensual dispute resolution processes within the administrative justice system and that, where appropriate:

Administrative tribunals, as part of their service planning, identify opportunities for adopting early and alternative dispute resolution techniques.

Government contribute to the development of information, expertise and advice on:

- **how and when it would be appropriate to provide consensual dispute resolution processes in individual tribunals;**
- **how to design comprehensive dispute resolution systems that do not rely solely on adjudication to resolve disputes.**

Government amend the enabling statutes of administrative tribunals to include:

- **a power for tribunals to engage in consensual dispute resolution processes;**
- **provisions dealing with the appointment of neutrals, confidentiality and enforcement of agreements.**

INDEPENDENCE AND ACCOUNTABILITY

Report and Recommendations

Prepared by

Administrative Justice Project

for the

Attorney General of British Columbia

July 2002

FOREWORD

The following report was prepared for British Columbia's Administrative Justice Project. Established in July 2001, the Project is part of the government's commitment to ensure that the administrative justice system is accessible, efficient, fair and affordable.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. It has also set forth a series of recommendations to address the most significant challenges facing the system today.

Perhaps no issue provokes more discussion and debate within the administrative justice community than the interrelationship between the concepts of tribunal "independence" and "accountability". Parties in proceedings before tribunals have challenged government's authority to structure tribunals in certain ways and, while the courts have confirmed that governments are fully competent to create tribunals under provincial legislation, details about the appropriate institutional relationship between tribunals and the government have not been finally settled from a policy perspective.

This report addresses questions about what constitutes inappropriate government interference in tribunals' independent decision making responsibilities – and about what limitations, if any, government might face in implementing appropriate mechanisms for the full public accountability of administrative tribunals. On the one hand, there must be an appropriate balance between independence and accountability. On the other hand, initiatives that foster independent decision making may also enhance the public accountability of administrative tribunals.

The analysis and recommendations presented here support the Administrative Justice Project's White Paper. Copies of the White Paper, other background papers, reports and further information on the Project are available through the Internet at: www.gov.bc.ca/ajp.

Interested readers are invited to provide comments on the White Paper and related reports before November 15, 2002 by:

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Table of Contents

Introduction 1
Points of Contact: Functional Relationship between Tribunals and Government 2
- Obligatory Points of Contact 3
- Other Points of Contact 3

Legal Considerations: Independence and Administrative Tribunals 4
- Sources of Law 5
- Constitutional Framework 5
- Judicial Independence 6
- Natural Justice 8
- Role of Administrative Tribunals: Quasi-Courts or Something Else? 10
- Independence of Administrative Tribunals 12
- Summary 13

Accountability 13
Policy Considerations 15
- Policy Principles 16

Recommendations 17

INTRODUCTION

The independence and accountability of administrative tribunals are central issues in the administrative justice system. Both are important but there can be points of conflict or tension between them. What is the appropriate balance between independence and accountability? Does this balance vary depending on the type of administrative tribunal? To what extent can both independence and accountability be fostered? These are the questions addressed in this report.

Administrative tribunals exercise a court-like function when they make adjudicative decisions. Yet most tribunals also perform non-adjudicative tasks, and all tribunals are in one sense part of the executive arm of government. They are not courts. In structuring its institutional relationship with tribunals, government needs to foster an appropriate level of tribunal independence in deciding individual cases and to achieve an appropriate level of tribunal accountability in the performance of their statutory mandates. This report makes recommendations to government on achieving these important goals.

Tribunals are created and usually funded by government to carry out specific functions assigned to them by the legislature. A common reason for creating a tribunal is so that a particular task can be carried out at arm's length from government. Another frequent reason is to provide a quicker and less formal alternative to the courts in adjudicating certain matters. This last reason applies particularly to those administrative tribunals which have an adjudicatory function – the focus of the Administrative Justice Project. A degree of independence from government is necessary for these tribunals to carry out their functions effectively.

Why is independence important? When deciding cases, administrative tribunals are part of the overall system of justice, and public confidence in the integrity of the justice system is essential in a fair and democratic society. Ensuring such confidence requires a public perception that decisions are based on the merits of cases, and are made in a fair way – free from outside interference by the government (or indeed by non-government groups that may wield influence).

On the other hand there must also be a degree of accountability. An important question is to whom should administrative tribunals be accountable. Another question is for what should tribunals be held to account. On this second point, there is an important distinction between accountability for specific adjudicative decisions and accountability for the efficient and appropriate operation of the tribunal as a whole. For example, financial management of a tribunal and the overall timeliness of decision making are different issues, compared to whether a particular decision was made correctly.

This report addresses the legal and policy factors relevant to structuring an appropriate institutional relationship between government and administrative tribunals. As will be seen, the existing case law gives the legislature considerable freedom in determining the degree of independence it gives an administrative tribunal. The result is that careful policy consideration must be given to finding the correct balance between independence and accountability.

POINTS OF CONTACT: FUNCTIONAL RELATIONSHIP BETWEEN TRIBUNALS AND GOVERNMENT

Before turning to the legal and policy issues, it is helpful to understand the practical context within which questions of independence and accountability arise.

Obligatory Points of Contact

At least three points of contact are inescapable in the relationship between government and tribunals. Most tribunals are funded by government. This means that budget requests must be provided to government and government must make decisions about the amount of money devoted to a particular tribunal. A second critical point of contact is in the appointment of members to tribunals – a subject addressed in a separate White Paper report, Making Sound Appointments. For present purposes, one need note only that, since government appoints most tribunal members, there is an inescapable role for government in deciding who it will appoint and on what terms and conditions. This is true irrespective of statutory or other policy decisions the province might make about the appointment or tenure of tribunal members.

A third point of contact is less concrete than the previous two but nonetheless important. Under our system of government, the executive is responsible and accountable to the legislature (consisting of the elected representatives of the people) and ultimately to the electorate. This ultimate accountability of government to the electorate includes accountability for both individual tribunals and broader issues affecting the administrative justice system as a whole.

The accountability of the executive to the legislature requires that tribunals be, in at least some respects, accountable to government. This statement does not prejudge either the precise degree of that accountability or the matters for which tribunals should be held accountable. But it is a point of contact between government and tribunals which must be considered when assessing the appropriate balance between independence and accountability.

Other Points of Contact

There are other instances in which government and tribunals may interact. In one sense, these points of contact can be viewed as optional since they are not necessarily inherent to the government and tribunal relationship.

Generally, these "optional" issues encompass a range of support and infrastructure matters where a tribunal may interact directly with an arm of government. These matters include office space, information systems support and human resources assistance in hiring tribunal staff. Training for tribunal members (especially new members) is a task where interaction could occur between government and tribunals or the tribunal community as a group (perhaps via the British Columbia Council of Administrative Tribunals). Especially where a number of tribunals have sufficient features in common, government could facilitate some form of centralized registry for

those tribunals. There are also a number of instances where Cabinet has the ability to prescribe rules of procedure which will govern hearings before a particular tribunal.[1] Another form of possible interaction between government and tribunals is where Cabinet (or a minister) has the statutory power to issue a formal direction to a particular tribunal.[2]

One obvious way in which government may interact with certain tribunals is where the province is a party to a proceeding before the tribunal. For example, the province is a party to an appeal to the Medical and Health Care Services Appeal Board when there is a question whether a particular individual qualifies as a beneficiary for coverage under the Medical Services Plan.[3]

In summary, there is a broad range of ways in which government and administrative tribunals must interact. This is the factual context within which decisions must be made about the appropriate degree of government control over tribunals. This question is most acute in the case of tribunals which exercise adjudicative powers — the primary focus of the Administrative Justice Project.

LEGAL CONSIDERATIONS: INDEPENDENCE AND ADMINISTRATIVE TRIBUNALS

In order to understand what the courts have said about the independence of administrative tribunals, it is helpful first to address the following matters:

- sources of law;
- constitutional framework;
- judicial independence;
- natural justice.

These form the backdrop against which any discussion of tribunal independence must occur.

1 See, for example, *Forest Act*, R.S.B.C. 1996, c. 157, s. 151(2)(q) and *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, s. 220.

2 For example, cabinet has the power to issue directions to the Utilities Commission: *Utilities Commission Act*, R.S.B.C. 1996, c. 473, s. 3. At the federal level, cabinet has the power to issue certain directions to the Canadian Radio-television and Telecommunications Commission, under sections 26 and 27 of the *Broadcasting Act*, Stats.Can. 1991, c.11.

3 *Medicare Protection Act*, R.S.B.C. 1996, c. 286, ss. 41-42.

Sources of Law

There are three sources of law.[4] First is the constitution. With some exceptions, constitutional powers and restrictions are contained in the *Constitution Act*, including the *Canadian Charter of Rights and Freedoms*. The second source is statute law, which is enacted by a legislature (or the federal Parliament).[5] The third and final source is the common law. This describes the non-statutory case law developed by the courts through case-by-case decisions. The common law is the primary source of law in areas such as contract and negligence. It is also the source of law on natural justice, an important area of law for administrative tribunals.

There is a hierarchy to the three sources of law. The constitution is the supreme law of the land. As long as a legislature acts within its constitutional powers, it has freedom to enact what statutes it wishes. This concept is known as the sovereignty of Parliament. One important consequence is that a legislature can modify the common law – including the law on natural justice.[6]

Constitutional Framework

Under the constitutional framework which Canada inherited from Great Britain, we have three separate levels of government: the legislature, the executive and the judiciary. The legislature creates law by enacting statutes. The executive is Cabinet (assisted by the public service). It administers or carries out the operations of government. The judiciary is the courts. The courts decide cases between individuals as well as litigation between government and individuals, or between levels of government.

This constitutional structure must inform any discussion about the appropriate levels of independence and accountability for administrative tribunals.

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4 An complete discussion of sources of law would include the royal prerogative; however, it has no relevance to the present discussion and can be left to one side.

5 Much law is contained in regulations, which are made pursuant to a statute. Regulations are not, however, an independent source of law; their legal force relies on provisions in the statute under which they are made.

6 For two Supreme Court of Canada cases on this issue, see *Ocean Port Hotel Ltd. v. British Columbia (Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, (2001) 204 D.L.R. (4th) 33; and *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301.

Judicial Independence

The independence of administrative tribunals is frequently measured against the touchstone of judicial independence. What is judicial independence? Why is it important?

For answers to these questions, we can look to the Supreme Court of Canada, which has stressed the importance of judicial independence in various decisions in the past 20 years or so. A number of cases referenced below illustrate how the principles of judicial independence protect judges from outside influence. An extreme example of such influence would be a telephone call from a Cabinet minister to a judge in the hope of affecting how a particular case was decided. A more complex issue is the process used by government when deciding the amount of judicial salaries.

Independence is linked to, but separate from, impartiality. Simply put, impartiality refers to a state of mind whereas independence refers to:[7]

> …a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

Although the question of judicial independence arises in several contexts, a number of the leading cases have arisen under section 11(d) of the *Charter of Rights and Freedoms* which guarantees a person charged with an offence:

> …to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. [emphasis added]

This constitutional guarantee of a hearing before an independent and impartial tribunal applies to accused persons and appears to have no application to administrative tribunals created by the province.

Meanwhile, the following passage from a recent Supreme Court of Canada decision explains the importance of both actual judicial independence and the perception of independence:[8]

> *The general test for the presence or absence of independence consists in asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status…. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice…. In order for the independence in the*

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7 *Valente v. Her Majesty the Queen*, [1985] 2 S.C.R. 673 at para. 15.

8 *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 at para. 38.

> *constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.*

The courts have viewed this issue from two perspectives. First, they have identified the following characteristics of judicial independence:[9]

- **Financial security** has been at the core of most cases on the independence of judges. For example, a 1997 decision of the Supreme Court of Canada addressed the constitutional requirements for the process of determining salaries for provincial court judges.[10]

- **Security of tenure** refers to the protection of judges from being dismissed from office except in the most unusual circumstances. For example, a judge of the British Columbia Supreme Court can be removed from office only by the Governor General, following a request from both the Senate and the House of Commons.[11]

- **Administrative independence** has been defined as:[12]

  > *...control by the courts "over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (p. 712 [Valente]). These were defined at (p. 709 [Valente]) in narrow terms as*
  >
  > > *assignment of judges, sittings of the court, and court lists, -- as well as the related matter of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions....*

  As noted above, the content of administrative independence is confined narrowly to matters that affect the adjudicative function directly.

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9 See, for example, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 and *Re Independence of the Provincial Court of British Columbia, Justices of the Peace*, 2000 BCSC 1470.

10 *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island, supra.* Provincial court judges are those judges appointed to the Provincial Courts. These are inferior courts created by the province and whose judges are appointed by the province. In contrast, judges of the provincial superior courts are appointed by the Governor General in Council. In British Columbia, the two superior courts are the British Columbia Supreme Court and the Court of Appeal.

11 *Constitution Act, 1867*, s. 99(1).

12 *Reference Re Remuneration, supra*, at para. 117.

In addition to identifying the characteristics listed above, the courts have ruled from a second perspective – that independence should be viewed from both the individual and the institutional dimensions.[13] The individual dimension focuses on the particular judge deciding the case in question. Is he or she impartial? The institutional dimension is larger and reflects the collective independence of the court (consisting of all its judges) as a whole.

Generally, judicial independence exists because of the role played by the courts. Apart from deciding cases between individual litigants, courts are the final arbiters in disputes between individuals and government. This last group of disputes includes issues arising under legislation as well as cases involving the protection of constitutionally guaranteed rights alleged to have been breached by government. In a federal state such as Canada, courts are also the final arbiters in disputes between provinces and the federal government about which level of government has constitutional jurisdiction over a particular subject matter. The Supreme Court of Canada has explained the constitutional role of the courts as follows:[14]

> *...the institutional independence of the judiciary was said [in Beauregard] to arise out of the position of the courts as organs of and protectors "of the Constitution and the fundamental values embodied in it – rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important"…. Institutional independence enables the courts to fulfill that second and distinctly constitutional role.*

For these and other reasons, the courts have stressed and upheld the importance of judicial independence.

Natural Justice

Natural justice is an important issue when discussing the independence of administrative tribunals, especially for tribunals which exercise an adjudicative function. Natural justice has two broad components. Both relate to procedural matters leading to certain types of decisions and are not directly concerned with the substance of those decisions. A considerable body of law exists on what types of decisions attract the requirements of natural justice (or procedural fairness). Very simply, most types of adjudicatory decisions trigger the requirements of natural justice. These include, for example, decisions whether a liquor licence should be cancelled, an

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13 *Mackin, supra*, para. 39; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, supra.*

14 *Reference Re Remuneration, supra*, at para. 123.

injured worker should receive workers' compensation or a lawyer should be disciplined by the Law Society.

The first component of natural justice is that a decision maker must listen to the person affected by the decision: *audi alteram partem*, literally "listen to the other side". In practice, this usually includes, as a bare minimum, the right to know the case against you and an opportunity to be heard. The second component is the rule against bias: *nemo judex in sua causa* or "no one should be a judge in his own case". This is the rule of most relevance to the issue of tribunal independence.

These two broad rules or components of natural justice do not provide rigid answers about what should happen in a particular situation. The specific application of the rules of natural justice depends on the circumstances of the individual case. For example, natural justice may require a right of cross-examination in some cases but not in other situations. The specific application of natural justice depends in part on provisions in the statute under which the decision is being made.

Natural justice is judge-made case law. It is used by the courts when deciding whether a statutory power has been exercised in a procedurally acceptable way. Although there are different views about the formal role of natural justice, it can be viewed as a set of guidelines or rules used by the courts in deciding whether a statutory power has been exercised in the way intended by the legislature. As noted earlier, the rules of natural justice are subject to a contrary legislative intention.

There is one way in which the rules of natural justice may indirectly gain a legal ability to override even an express statutory provision. Section 7 of the *Charter of Rights and Freedoms* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

There is considerable overlap between natural justice and the procedural component of the "principles of fundamental justice".[15] The result is that at least some of the rules of natural justice may effectively have constitutional force if a particular case triggers section 7 of the *Charter*. Most decisions made by administrative tribunals do not, however, trigger the protection of life, liberty and security referred to in section 7 of the *Charter*.

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[15] There is also a substantive content to the principles of fundamental justice.

Role of Administrative Tribunals: Quasi-Courts or Something Else?

The Supreme Court of Canada recently provided an unequivocal statement about the role of administrative tribunals and the legal principles that govern the degree of independence given to a tribunal by the legislature. The issue before the Supreme Court in *Ocean Port Hotel Ltd.*[16] was whether the British Columbia Liquor Appeal Board had sufficient independence. The case involved the security of tenure of board members, who were appointed "at pleasure". The Court of Appeal had concluded that board members had insufficient independence because of Cabinet's ability to terminate their appointments.[17] It set aside the Liquor Appeal Board's decision. The Supreme Court of Canada reversed the decision of the Court of Appeal.

The Supreme Court of Canada ruled that, subject to constitutional constraints, the rules of natural justice concerning impartiality and independence could be overridden by statute:

> [para. 20] *This conclusion, in my view, is inescapable. It is well-established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.*
>
> [para. 21] *Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: Minister of National Revenue v. Cooper and Lybrand, [1979] 1. S.C.R. 495, at p. 503; Law Society of Upper Canada v. French, [1975] 2 S.C.R. 767, at pp. 783-84. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice: Matsqui, supra (per Lamer C. J. and Sopinka J.); Régie, supra, at para. 39; Katz v. Vancouver Stock Exchange, [1996] 3 S.C.R. 405. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": Régie, supra, at para. 39.*
>
> [para. 22] *However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication…. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory*

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16 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52.

17 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control)*, 1999 BCCA 317 at paras. 33 and 37-38.

> *direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.*

The court then discussed a fundamental distinction between administrative tribunals and the courts:

> [para. 23] *Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective, guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts….*
>
> [para. 24] *Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making functions, it is properly the role and responsibility of the Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.*

After referring to the "traditional division between the executive, the legislature and the judiciary" and the resulting constitutional need for judicial independence, the court continued:

> [para. 32] *…The classical division between court and state does not … compel the same conclusion in relation to the independence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.*
>
> [para. 33] *…I can find no basis upon which to extend the constitutional guarantee of judicial independence that animated the Provincial Court Judges Reference to the Liquor Appeal Board. The Board is not a court, nor does it approach the constitutional role of the courts. It is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function. Licenses are granted on condition of compliance with the Act, and can be suspended for non-compliance. The exercise of power here at issue falls squarely within the executive power of the provincial government.*

Two results flow from this decision:

1. Absent constitutional constraints, the legislature is free to adopt what institutional relationships it wishes for provincial tribunals.
2. In the absence of contrary legislation, the courts may impose a natural justice requirement that an adjudicative tribunal be independent and impartial in its decision making.

Independence of Administrative Tribunals

The concept of judicial independence does not, strictly speaking, apply to administrative tribunals. However, a number of the values and some of the content of the law on judicial independence do have application to administrative tribunals when they make adjudicative decisions. The reason is that a basic concept behind judicial independence also forms part of the rule of natural justice against bias: a decision maker should not only be impartial but also be perceived by a reasonable person as being impartial. There is a direct link between the amount of independence enjoyed by a tribunal and its members and whether the institutional arrangements create "a perception of reasonable apprehension bias".[18]

This is currently a fertile area for litigation. At the time of writing, at least two appeals are pending in the Supreme Court of Canada on this issue.[19] A frequently cited passage is the dicta of Chief Justice Lamer in *Canadian Pacific Ltd. v. Matsqui Indian Band*:[20]

> *I agree and conclude that it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent. Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension. Moreover, the principles for judicial independence outlined in Valente are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties. However, I recognize that a strict application of these principles is not always warranted.*

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18 *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405.

19 *Bell Canada v. Canada (Human Rights Commission)*, 2001 FCA 161; Supreme Court of Canada Docket No. 28743. *C.U.P.E. v. Ontario (Minister of Labour)* (2000), 194 D.L.R. (4th) 265 (Ont.C.A.); Supreme Court of Canada Docket No. 28396. In addition to these two common law cases, there has been litigation in Quebec arising under section 23 of the Québec *Charter of Rights and Freedoms*: *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; and *Procureure Générale du Québec v. Barreau de Montréal*, September 5, 2001, Quebec C.A., J.Q. No. 5472.; leave application to S.C.C. pending at the time of writing (Docket No. 28910).

20 [1995] 1 S.C.R. 3 at para. 80. The formal basis for the decision in *Matsqui* did not involve the questions of institutional independence and institutional impartiality.

Questions about the application of judicial independence to administrative tribunals arise most frequently in the context of security of tenure. There is a dearth of cases addressing how the administrative independence component of judicial independence applies in practice to administrative tribunals.

Summary

This section of the report has described the legal principles governing the independence of administrative tribunals when exercising an adjudicatory function.

First, in the absence of contrary statutory language, courts apply the requirement of natural justice for an impartial decision maker. In doing this, the courts address not only the personal impartiality of the adjudicator but also the degree of institutional independence of the tribunal. The three key factors for independence are security of tenure, financial security and administrative independence.

The second general principle is that the legislature has the power to displace the rules of natural justice – except in the rare situation when there is a constitutional constraint on this legislative freedom.

ACCOUNTABILITY

Independence is only one side of the story. Since government is ultimately responsible to the electorate for the proper operation of the administrative justice system, tribunal accountability must also be considered.

Tribunals are accountable for carrying out the functions assigned to them by their enabling statutes. This general statement does not, however, explain precisely for what things tribunals are accountable – nor does it reveal how this accountability can or should operate. Accountability is not an all-or-nothing proposition. As with tribunal independence, it is important to clarify the types of accountability under discussion.

The following is a list of matters that might come to mind when considering tribunal accountability:

- quality of individual decisions;
- timeliness of decisions;
- courteousness of members during hearings;

- ethically appropriate behaviour and compliance with a Code of Ethics;
- effective case management;
- effective management of non-adjudicative tribunal staff (if any);
- financial management.

The list is not exhaustive but illustrates the range of matters for which some degree of accountability might at first be considered. Some of the matters relate directly to the adjudicative function in individual cases (quality of decisions, timeliness of decisions and courteousness). Others relate to individual cases but also have broader application (ethically appropriate behaviour and effective case management). Others relate primarily to management of the tribunal as an organization (management of non-adjudicative staff and finances).

Accountability can be exercised in several ways. For example, there could be public accountability for the quality of individual decisions; for example a decision maker could be required to defend the merits of a particular decision. This mode of accountability would be extremely problematic since it would strike at the core of independent decision making. The essence of quasi-judicial decision making is that competent decision makers are both entitled and required to make decisions as they see best – subject to any rights of appeal or judicial review which may be available to a party unhappy with a particular decision. On the other hand, accountability for rendering timely decisions, courteousness and ethically appropriate behaviour are matters for which individual tribunal members can appropriately be held accountable through performance management carried out by the chair of a tribunal.

At the tribunal or organizational level, there are a number of matters for which a level of accountability to government can be appropriate. These matters include:

- use of an effective case management system;[21]
- management of non-adjudicative tribunal staff (if any);
- financial management.

One method of structuring accountability for these matters is for legislation to clarify that the chair is head of the tribunal, not merely the first among equals.

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[21] It is probably appropriate that there be accountability for ensuring that an appropriate case management system is in place; however, the design of the system should be in the hands of the tribunal since it has a direct bearing on the tribunal's decision making process.

POLICY CONSIDERATIONS

The law on tribunal independence gives considerable latitude to the legislature in achieving a balance between independence and accountability. It is therefore critical to address the following question: What principles should be followed when the province decides on the appropriate degree of independence and accountability for administrative tribunals?

The answer to this question depends in part on how one characterizes the role of administrative tribunals – a process which takes into account two realities.

First, tribunals are not homogenous. For some, their only role is adjudication of individual cases. For others, their primary task is regulatory, although they may also have a significant adjudicative component to their mandate. For yet others, an important part of their role is policy related and at least one tribunal is explicitly stated to be an agent of the Crown.[22] This variation has implications when deciding on an appropriate institutional relationship between government and the administrative tribunals it creates.

The second reality that must be considered is the nature of tribunals' adjudicatory function. Views about this vary. At one end of the spectrum are those who see tribunals in their adjudicatory function as being court-like in many respects. For example, the landmark 1957 *Franks Report* stated:[23]

> *Tribunals are not ordinary courts, but neither are they appendages of Government Departments....We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration....the intention of Parliament to provide for the independence of tribunals is clear and unmistakable.*

This approach is also reflected in the recent English report on the administrative tribunal system in that country.[24]

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22 *Securities Act*, R.S.B.C., c. 418, s. 5(1). In addition, section 3(11) of the *Medicare Protection Act*, R.S.B.C., c. 286 contains the following provision concerning the Medical Services Commission:

> The commission may sue or be sued in its own name or in the name of the government in any civil action respecting the commission or a special committee, but any proceeding by or against the commission is binding on the government, and the *Crown Proceeding Act* applies accordingly.

23 *Report of the Committee on Administrative Tribunals and Enquiries*, (1957) HMSO, Cmnd 218, at para. 128.

24 Sir Andrew Leggatt, *Tribunals for Users One System, One Service: A Report of the Review of Tribunals by Sir Andrew Leggatt* (2001); available online: http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm.

At the other end of the spectrum are comments by the Attorney General of Australia about a ministerial power to issue directives to a tribunal reviewing government decisions:[25]

> *Well the criticism of that I think fails to recognise that these are merits reviews of decisions made by the executive. The executive operates under government policy. Ministers and Cabinet made government policy, there is no reason why on a merits review, policy shouldn't be relevant to the review process as it is to the original decision making. Ministerial directions to the tribunals will be able to reflect the relevant policy involved in the area of decision making.*

Chief Justice Lamer made a somewhat similar comment several years ago when he described administrative tribunals as:[26]

> *"Mere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members, while the tribunal is in existence, usually serve at the pleasure of the government of the day, and whose decisions in some circumstances are properly governed by guidelines established by the executive branch of government...*

Somewhere between these two extremes is the Supreme Court of Canada's recent description of the primary function of administrative tribunals as policy-making, even if policy implementation sometimes occurs through making quasi-judicial decisions.[27] Interestingly, this comment was made in the context of an appeal board whose statutory mandate was limited to deciding questions of law or natural justice.

Policy Principles

The crux of the issue is the need to maintain independence of decision making for adjudicative or quasi-judicial functions, while providing accountability to government for overall tribunal operations. Although decision makers should not be held accountable to government for individual decisions, even a purely adjudicative tribunal must, at one level, be accountable for sound management of the public financial resources devoted to it. Government is ultimately accountable for management and operation of the administrative tribunals which it has created.

The following principles are among those which should inform government policy in this area:

- Independence of adjudicative decision making and public accountability for tribunal management are both important. Government should take steps to foster both.

---

25 This comment was made concerning legislation for a proposed new review tribunal. See the online transcript of "The Law Report" on Radio National: http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s195024.htm.

26 *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] S.C.R. 854 at para. 13.

27 *Ocean Port, supra.*

- In discussing independence, it is important to distinguish between independence with respect to decision making in individual cases and overall institutional independence.
- The appropriate balance between institutional independence and accountability may vary somewhat among tribunals. This variation may be affected by factors such as the following:
  - relative importance of the tribunal's adjudicatory function within its overall mandate;
  - size of the tribunal;
  - whether the tribunal is a part time or a full time operation with a number of staff;
  - whether the tribunal hears cases in which government is a party or whether it hears cases only between private individuals;
  - links (if any) between the tribunal's policy making function and the policy creation function of the relevant line ministry.

The single most important policy principle is probably design of the appointment process. An open and merit based appointment process helps ensure public confidence in the competence and quality of decisions rendered by tribunals. Security of tenure and financial security of tribunal members are factors in achieving independence of decision making. Both matters are addressed in a separate report and should be dealt with appropriately by legislation and operational policy.

RECOMMENDATIONS

In order to provide a foundation for the development of a shared understanding about the role and purposes of the administrative justice system, it is recommended that government adopt the following guiding principles, namely that:

Government base its ongoing relationships with administrative tribunals on a commitment to the principles of:

- **independence for administrative tribunals in adjudicative decision making;**
- **public accountability for administrative tribunals through the adoption of modern and innovative management practices.**

Government reinforce the decision making independence of tribunals by:

- **continuing to respect decisions of tribunal members in individual cases;**
- **formalizing relationships with tribunals through clear legislation, policies, practices and agreements;**
- **establishing standard terms and conditions of appointment;**
- **acknowledging the role of organizations like the British Columbia Council of Administrative Tribunals and the Circle of Chairs;**
- **providing public information and education on the role and purpose of administrative tribunals.**

Government strengthen public accountability for administrative tribunals by:

- implementing an appointment process that is open, transparent and merit-based;
- establishing a management framework that is proportionate to the scope of the tribunal's activities and sets out clearly the respective roles and obligations of both government and the tribunal.

In establishing the level of independence and accountability that is appropriate to the diverse mandates and operating circumstances of individual tribunals, government should be guided by the following additional principles, namely that:

- tribunals should be accountable for producing fair and competent decisions in a timely fashion;
- public confidence in the fairness, quality and impartiality of tribunal decisions should not be undermined through unnecessary or inappropriate government interference in tribunal operations;
- government and tribunals should have shared obligations for using in a prudent manner public funds allocated to tribunal operations.

MAKING SOUND APPOINTMENTS

Report and Recommendations

Prepared by

Administrative Justice Project

for the

Attorney General of British Columbia

July 2002

FOREWORD

The following report was prepared for British Columbia's Administrative Justice Project. Established in July 2001, the Project is part of the government's commitment to ensure that the administrative justice system is accessible, efficient, fair and affordable.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. It has also set forth a series of recommendations to address the most significant challenges facing the system today.

This report discusses issues related to the appointment of administrative tribunal chairs and members – issues which have emerged as central themes in the literature, in discussions with public officials and in the principled assessment of reform initiatives in other jurisdictions. There is strong consensus that, unless appointment issues are addressed in a complete and comprehensive way, success in realizing other administrative justice reforms is likely to be elusive, difficult or short-lived.

The analysis and recommendations presented here support the Administrative Justice Project's White Paper. Copies of the White Paper, other background papers, reports and further information on the Project are available through the Internet at: www.gov.bc.ca/ajp.

Interested readers are invited to provide comments on the White Paper and related reports before November 15, 2002 by:

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Table of Contents

Introduction 3
- Key Concepts 6
  - Order in Council Appointments 7
  - Ministerial Appointments 8
  - Appointments by the Head of a Public Agency 8

Recruitment and Selection 9
- Planning 10
- Needs Assessment 12
  - Full Time Members 13
  - Part Time Members 14
  - Contract Adjudicators 15
  - Cross-Appointments 16
- Selection Criteria and Position Descriptions 17
- Seeking and Selecting Candidates 19
  - The Search 20
  - Screening and Interviewing 21
  - Due Diligence 22
  - The Decision 22
- Assessing the Recruitment and Selection Process 23
- Recommendations for Recruitment and Selection 23

Terms and Conditions of Appointment 24
- Term and Tenure 25
  - General Provisions for Term and Tenure – the *Interpretation Act* 26
  - Appointments At Pleasure 26
  - Appointments during Good Behaviour 28
  - Term for a Working Life 29
  - Fixed Term Appointments 30
  - Staff Appointments 31
  - Assessing the Framework for Term and Tenure 32
- Reappointments 34
  - The Role of the Chair 34
  - Reappointment Policies 35
  - Assessing the Framework for Reappointments 38
- Termination and Severance 40
  - Severance – Definition and Application 41
  - Authority to Terminate Appointments 42
  - Grounds for Terminating Appointments 43
  - Process for Terminating Appointments 44
  - Assessing the Framework for Termination and Severance 44

Assessing Appointment Terms and Conditions 45
Recommendations for Appointment Terms and Conditions 46
Compensation and Benefits 46
Compensation for Full Time Appointees 47
Compensation for Part Time Appointees 48
Benefits 49
Establishing a Compensation Framework 49
Assessing the Compensation Framework 50
Recommendations for Compensation and Benefits 51
Institutional Considerations and Options 51
Shared Responsibilities for Recruitment and Selection 52
Selecting and Appointing Tribunal Chairs 53
Selecting and Appointing Tribunal Members 53
Appointment Models 54
Model 1 – Responsibility Centralized in an Agency in the Premier's Office 55
Model 2 – Responsibility Vested in Host Ministries 56
Model 3 – Responsibility Centralized in a Public Sector Human Resource Agency 59
Model 4 – Responsibility Centralized in a Government Services Ministry 60
Model 5 – Responsibility for Member Appointments Vested in Administrative Tribunals ... 62
Model 6 – Responsibility Centralized in a Council of Administrative Tribunals 63
Assessing Appointment Models 65
Recommendations for an Appointment Model 66
Policy Instruments 67
Enabling Legislation, Regulations and Orders in Council 68
Memorandum of Understanding 68
Appointment Agreements 69
Recommended Policy Instruments 70
Conclusion and Recommendations 71
Recommendations 72
Recommendations for Recruitment and Selection 72
Recommendations for Appointment Terms and Conditions 73
Recommendations for Compensation and Benefits 73
Recommendations for an Appointment Model 73
Recommended Policy Instruments 74

INTRODUCTION

Questions about how appointments are made and who has a role in recruitment and selection are critical concerns for government and the tribunals that form the core of the province's system of administrative justice. In this respect, a modern and relevant approach to tribunal appointments requires a commitment to:

- the principle of merit as the basis for appointment decisions;
- the values of transparency, fairness, flexibility, affordability and efficiency.

This report examines appointment issues unique to administrative tribunals and makes recommendations to government for enhancing current appointment practices and processes.[1] The Terms of Reference for the Administrative Justice Project established guidelines for this report in the following way:

> *The relationship between government and administrative agencies has unique qualities that are not found in government's relationship with Crown corporations and other public institutions. While Crown corporations are usually established to achieve business purposes in competitive commercial markets, many Crown corporations are also expected to balance corporate goals with the social and economic policy objectives of government. In choosing appropriate directors for Crown corporations, government is well-advised to seek individuals who can contribute to the effective oversight of the Crown corporations and who can also understand and give effect to government's policy objectives.*
>
> *With respect to administrative agencies, and in particular in those adjudicative tribunals where proceedings involve government as a party, different factors and issues come into play. Government's role in the ongoing operations of administrative agencies is more akin to its role in relation to provincial courts. The principal source of policy with respect to government objectives is expressed through an administrative agency's enabling legislation and regulations. Aside from enacting legislation and regulations, government's primary responsibilities are to choose agency members and adjudicators who are seen as fair, impartial and independent and, in many instances, to provide support services and resources for ongoing agency operations.*
>
> *The differences noted here raise a number of issues with respect to the appointments process for administrative agencies. These differences suggest that specific standards and considerations should be set and taken into account in developing government's overall framework for government appointments to administrative justice agencies.*[2]

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1 A background paper, Appointments: A Policy Framework for Administrative Tribunals, was released by the Project in May 2002. The paper and related appendices are available at http://www.gov.bc.ca/ajp.

2 Administrative Justice Project. Terms of Reference, July 2001. Available online at http://www.gov.bc.ca/ajp.

At the centre of the discussion about administrative tribunal appointments is the goal of achieving the right balance between the independence of individual decision makers and the tribunal's formal accountability to the people it serves. In this respect, public accountability flows from the tribunal to the responsible host government minister and ultimately through Cabinet to the Legislature. At the same time, the accountability framework for tribunals must take into account and be respectful of the arm's length role and independence of tribunal members as decision makers in individual proceedings that come before them.

From a broader perspective, administrative tribunals serve a compelling public purpose by providing an accessible and cost effective forum for decision making in matters that affect the everyday lives of British Columbians in their various roles as landlords, tenants, employers, workers, business owners, family and community members. As the principal components of the province's system of administrative justice, administrative tribunals have become an integral part of the services government provides, often representing the only point of contact many people have with the formal justice system.

Three themes have emerged in the course of preparing this report. First, in making appointments to administrative tribunals, there is a compelling need for government to provide greater certainty and consistency in policy and in the processes and standards that are followed and applied. In this respect, it is government's responsibility to ensure that the very best candidates are identified, recruited and appointed, thereby providing both a high level of public confidence and credibility in the administrative justice system and a recognized and respected career choice for the men and women who work in this system.

Government has already taken significant steps towards a framework for public appointments that is open, transparent and merit based. In July, 2001, the Board Resourcing and Development Office was established in the Premier's Office. The office was given responsibility for overseeing appointments to a broad and diverse array of more than 700 public agencies, boards and commissions, all of which operate with varying degrees of autonomy at arm's length from government's line ministries. As such, the mandate of the office is to:

- establish guidelines for all provincial appointments to agencies;
- ensure that all provincial appointments are made on the basis of merit following an open, transparent and consistent appointment process;
- ensure that appointees receive appropriate orientation and ongoing professional development with respect to agency governance issues.

In August 2001, the Board Resourcing and Development Office issued its Public Agency Appointment Guidelines[3] setting out principles for appointments to agencies, boards and commission and defining roles and responsibilities for the public agencies and officials involved in that process. As part of its mandate, the Administrative Justice Project was asked to consider how these guidelines could be applied to administrative tribunals and whether any other issues should be addressed in guidelines for administrative tribunals. This report builds on the work of the Board Resourcing and Development Office by addressing specific issues of interest to government and administrative tribunals.

A second theme involves the need for government to rethink and clarify its expectations of tribunal chairs with respect to both their specific obligations in the appointment process and their other duties as the heads of tribunals. In most cases, Cabinet is responsible for tribunal appointments, whether individuals are appointed as chairs or as members on either a full time or part time basis. In recent years, chairs have been increasingly held to account for the effective and efficient operation of their tribunals, even though they may have had little or no effective voice in selecting the candidates appointed to work with them. In the extreme, this tension can be unworkable and dysfunctional. Accordingly, a central focus of this report is on the evolving responsibilities of the chair and the appropriate role for this position in an appointment process that is open, transparent and merit based.

Third, it is timely for government to consider how it can and should respond to expressed needs within the administrative justice community for a central focus within the public sector to address the policy and legislative requirements of this vital part of the justice system. Across government, 17 ministers of the Crown currently have administrative responsibility for at least one of the tribunals included within the Terms of Reference for the Administrative Justice Project. In most cases, the responsible host ministers also oversee government programs that operate in policy areas related to the tribunals' core mandates. For example, the Minister of Advanced Education is host to the Private Post Secondary Education Commission. In other cases, there may be little substantive policy relationship between host ministers and administrative tribunals.

Deputy ministers and their senior staff have taken on a range of roles in the tribunal appointment process. In the ministries of Attorney General and Public Safety and Solicitor General, which together are host to 18 administrative tribunals, a division has been established to provide

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[3] Board Resourcing and Development Office. Public Agency Appointment Guidelines. Available online at http://www.fin.gov.bc.ca/abc.

centralized services, including services to monitor and track requests for tribunal appointments. Part of the division's mandate is to assist in recruitment and selection and to carry out some of the due diligence required to verify credentials of proposed appointees.

In other ministries, appointment responsibilities are often assigned to a corporate policy office or to a program area with a mandate related to the tribunal. Ministry staff may assist on an informal basis by preparing the documentation that goes forward through a minister's office but, otherwise, ministry staff have a more limited role in tracking vacancies, identifying potential candidates and carrying out the necessary due diligence.

Within the province's current tribunal appointment system, there are shortcomings, uncertainties, duplication and overlap in screening, selection and due diligence. For some ministries and tribunals, current practices and processes also give rise to issues about timeliness and delay. Addressing these issues will be central to the achievement of an approach to tribunal appointments that encompasses:

- a planned and transparent process for recruitment and selection;
- a comprehensive and competitive set of terms and conditions of engagement – dealing not only with remuneration, but also with performance expectations, management reviews, benefits, severance and transitions back to other work;
- a well-defined role for tribunal chairs, clearly articulating the respective operational responsibilities and accountabilities of both government and tribunals;
- a framework for government to organize itself, not only with respect to appointments, but also with respect to the other services it provides to administrative tribunals.

Key Concepts

Administrative tribunals apply legal principles and public policy to reach impartial decisions in individual cases – where it is in the public interest to render these decisions at a distance from the normal operations of government. The rationale arises, in some cases, because a government program or official has a stake in the outcome of a proceeding and, as such, government could not be seen to be impartial in reaching decisions that have consequences both for itself and for other affected parties. In other cases, independent administrative tribunals are established because the arm's length nature of the administrative process can be effective in diffusing political influence over decisions that should be based on sound professional or technical principles, knowledge or considerations. Tribunals are also established because their decisions can further the fundamental principles of natural justice, in a manner and forum that are both less formal and more accessible than the courts.

Many other public bodies and officials have adjudicative responsibilities, including the governing bodies of the province's professions and occupations and statutory decision makers in government ministries, such as the superintendent of motor vehicles or the chief forester. These entities are not expressly included within the Terms of Reference[4] for the Administrative Justice Project. However, many of the principles that are developed for administrative tribunals as part of the Project may be of interest or relevant to these other public bodies and officials.

As a general rule, the characteristics of public agencies influence – and are in turn affected by – the kind of appointment process used to recruit and retain members and staff. The methods are commonly used are appointment by Cabinet, appointment by a minister of the Crown or appointment by the administrative head of the public agency (a deputy minister, director or chair). These three methods are discussed in detail below. In addition, for a small number of tribunals, panel members may actually be selected by the parties from an approved list or roster that establishes minimum or representative qualifications.

Order in Council Appointments

If a statute states that the Lieutenant Governor in Council has authority to appoint a person to a public agency, that authority is exercised by Cabinet through an Order in Council signed by the Premier as head of the executive branch of government and by the Lieutenant Governor as the Crown's representative and formal head of government. A person appointed by Order in Council is ultimately accountable to the Premier and Cabinet and may only be removed from office at the end of a prescribed term, or by an order rescinding the original Order in Council, unless some other mechanism for removal is set out in the agency's enabling legislation.

Order in Council appointments have been used for a broad variety of purposes including appointments to the boards of directors of Crown corporations, appointments as members of non-governmental organizations constituted under provincial legislation and appointments to administrative agencies and tribunals. There are at present some 1,500 Order in Council appointments to agencies, boards and commissions across the provincial public sector. As the number of these appointments has increased over time, administrative costs and implications for government have also grown and are now significant.

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[4] A list of the administrative tribunals that are part of the Terms of Reference for the Administrative Justice Project is available online at http://www.ag.gov.bc.ca/ajp.

An Order in Council is used for appointments where it is in the public interest to provide for collective scrutiny of a prospective appointee by the elected officials who are responsible (as ministers of the Crown) for overseeing the government's activities. Within the administrative justice system, an Order in Council is typically preferred where:

- an administrative tribunal has a strategic role in implementing government policy;
- public confidence in the independence of the tribunal's decisions is paramount;
- the interests of stakeholders are potentially contentious or conflicting;
- a government ministry is a party before an administrative tribunal which is adjudicating individual rights and benefits;
- the decisions of staff in the tribunal's host ministry are reviewed by that tribunal.

Ministerial Appointments

A minister of the Crown may make appointments either formally – by order under the provisions of a public body's enabling legislation – or more informally through his or her general powers to execute contracts and agreements.

Ministerial orders have been widely used in a variety of circumstances for appointments to advisory bodies, to a limited number of tribunals and to other public program areas that require investigators, administrators or trustees. There are at present some 1,600 formal ministerial appointments to agencies, boards and commissions in the provincial public sector.

A ministerial order is used for appointments where it is in the public interest to provide a level of scrutiny by an elected official but it is not necessary, relevant or expedient to provide for the collective scrutiny of full Cabinet. Ministerial appointments may be appropriate where a ministry has specialized professional or technical expertise, relevant to the selection of prospective appointees. In these circumstances, professional or technical expertise can be given relatively more weight in the process than the scrutiny of Cabinet. Within the administrative justice system, a ministerial appointment may be considered where:

- the minister does not appear as a party in a proceeding before the administrative tribunal;
- the decisions of staff in the tribunal's host ministry are not reviewed by that tribunal;
- the discretion of decision makers is clearly defined in relevant legislation and policy.

Appointments by the Head of a Public Agency

The chair or head of a public agency may have a power to appoint other members to that agency. For administrative tribunals, this arises most commonly where the chair is authorized to appoint

adjudicators, panel members or other decision makers. The chair may also have authority to appoint staff or to retain consultants and contractors.

An appointment by the chair of an administrative tribunal is preferred where the scrutiny of an elected official is neither required nor desired and where the emphasis in the recruitment and selection process is on the professional judgment, technical expertise and qualifications of prospective appointees. Within the administrative justice system, appointments by the chair of an administrative tribunal may be considered where:

- the decisions are highly technical in nature and require specialized knowledge and expertise;
- the discretion of decision makers is relatively narrow and clearly defined in relevant legislation and policy;
- the volume of work is high and there is a need for flexibility and efficiency in appointing tribunal members and assigning cases;
- the work is of a part time nature;
- a range of outcomes is expected and can be tolerated.

In British Columbia, the power to appoint tribunal members has been conferred on the chairs of several tribunals including the Employment Standards Tribunal and the Appeal Division within the Workers' Compensation Board. In amendments tabled recently under the *Workers Compensation Amendment Act (No. 2), 2002*, the chair of the new appeal tribunal will be appointed by Order in Council while the other members of the tribunal will be appointed, following the transitional period, by the chair, after consultation with the host minister.

RECRUITMENT AND SELECTION

An orderly recruitment and selection process should place take place before appointments to administrative tribunals are made. From a policy perspective, it is critical to choose not only the appropriate appointment instrument (as discussed above) but also a recruitment and selection process that furthers government's goals for openness, transparency, accountability and selection based on merit. This point was reinforced in a 1989 report on regulatory boards and commissions for the Ontario government. The report's author, Robert Macaulay, noted that "it is important to distinguish between the quality of appointees and the quality of the appointment procedure".[5] As Macaulay observed, "the test of a good appointee is resident within the

[5] Macaulay, Robert. *Directions: Review of Ontario's Regulatory Agencies: Overview*, Queen's Printer, Toronto, 1989, p. 10.

individual" and even "the very best selection methods and procedures will not guarantee quality appointees". On balance, however, it would appear that effective procedures for recruitment and selection are more likely than not to improve the overall quality of tribunal appointments.

The central challenge for government in designing such procedures is to attract a diverse pool of the best and most qualified candidates and, at the same time, to achieve an appropriate balance between the potentially competing objectives of predictability, openness and responsiveness. In this respect, a recruitment and selection strategy should be:

- transparent, predictable and certain so that government can be held accountable to the public it serves;
- timely, open and fair so that administrative tribunals can be effective in furthering the core values and fundamental principles of the administrative justice system;
- flexible and responsive so that the appointment process itself can meet the ongoing operational needs of government and its administrative tribunals.

These objectives can be achieved more readily through an orderly recruitment and selection process that involves the following steps:

- planning;
- needs assessment;
- the development of selection criteria and position descriptions;
- a clear process for seeking and selecting candidates.

The precise process for recruitment and selection will vary in response to a number of factors including timing, the tribunal's current and particular needs, the characteristics of the current market and environment within which the tribunal operates, the likely availability of potential candidates, the professional and technical qualifications required to carry out the duties of the position being filled, the compensation being offered, the nature and location of the work and the relevant policies, priorities and practices of government. The nature of the process will also be determined in large part by the extent to which the chair is expected or required to play in role in recruitment and selection.

Planning

Careful planning is critical to the development of an effective recruitment and selection strategy. A good recruitment and selection plan should include the following components:

- a statement of the goals to be achieved;
- critical dates and timelines;

- strategies for attracting, selecting and retaining the right people at the right time and cost, including a plan for advertising and communications;
- a plan for consultation with external parties, identifying any protocols or procedures that must be followed in carrying out the consultation;
- a plan for ensuring compliance with applicable central government or ministerial directives;
- a description of the roles and responsibilities of the parties involved in carrying out the plan;
- an estimate of the financial and personnel resources required to implement the plan;
- a statement of the key deliverables.

A comprehensive strategy will have many benefits for the public institutions and individuals involved, including central government programs, host ministries and administrative tribunals. Among these benefits are opportunities to:

- link recruitment goals and strategies to tribunal service plans and performance measures;
- provide a mechanism for forecasting the time and resources required, within a given period, to schedule and manage appointment processes;
- establish a foundation for succession planning for key positions;
- outline a process for developing, maintaining and retaining core competencies;
- provide a mechanism for tribunals to obtain direction from central government programs and host ministers about recruitment and selection processes.

In this respect, tribunals should develop annual appointment plans that set out in advance:

- the number of vacancies anticipated in a given year, including the number to be filled by recruitment efforts and renewals;
- the types of positions to be filled, whether chairs or members and whether full time or part time;
- the kinds of recruitment and outreach activities that will be required, including their potential costs;
- the critical timelines from initiation to completion for key deliverables and appointment decisions.

Experience suggests that between four and six months' lead time is required to complete the recruitment and selection process for each appointment. Where a pool of qualified candidates exists or can be readily assembled, less time may be required. In contrast, where an upcoming vacancy requires candidates with highly specialized professional or technical knowledge and qualifications, considerably more time may be required to identify and recruit the best applicants. It is anticipated that careful planning on an annual basis will assist in shortening the current timelines for appointments.

Needs Assessment

Within the framework of a general strategy for recruitment and selection, a needs assessment defines an administrative tribunal's specific requirements in relation to upcoming vacancies. This assessment is the mechanism for reviewing and articulating requirements for members and, where enabling legislation permits, for the use of alternative adjudicative resources such as cross-appointments and contract adjudicators.

Under the Public Agency Appointment Guidelines, appointees to provincial agencies, boards and commissions are expected to possess certain core competencies, defined as follows:

- ***Personal Attributes:*** High ethical standards and integrity in professional and personal dealings; appreciation of the responsibilities to the public; ability and willingness to raise potentially controversial issues in a manner that encourages dialogue; flexibility, responsiveness and willingness to consider change; ability and willingness to listen to others; capability for a wide perspective on issues; and ability to work as a team member.
- ***Key Qualifications:*** Unique to each agency and include those required by legislation.

The needs of administrative tribunals are constantly evolving as a result of court decisions, changes in legislation, workload and the sophistication of tribunals' management systems and organizational cultures. The needs assessment provides an opportunity for government and tribunals to review requirements on an ongoing basis and to make recruitment and selection decisions within that changing environment. As Macaulay has observed:

> *The most reliable appointment procedures should concentrate not on who wants to be appointed, but rather [sic] the needs of agencies in serving the public interest. Most appointments and the needs of agencies must receive careful analysis before a decision is made because the needs of agencies are very precise and highly specialized dependent on the area of expertise required.*[6]

A needs assessment should further the overall goals of an effective recruitment and selection strategy and satisfy the following criteria:

Competency

- Does the tribunal's current and proposed membership provide the competencies required for effective decision making?

Transparency

- Would it be clear to an interested member of the public how the tribunal's needs were assessed and how the recommendations arising out of the needs assessment would enhance the effectiveness of the tribunal's decision making?

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[6] Ibid., p.17.

Fairness

- Is there any evidence of unfairness or bias in the recommendations made in the needs assessment?

Flexibility

- Does the needs assessment provide the tribunal with the ability to use the adjudicative resources it has and to modify these when needed?

Affordability/Efficiency

- Does the assessment of needs for full time, part time and contract adjudicators represent the best use of public resources?
- Will cross-appointments improve the efficiency of the tribunal's operations and enhance the effectiveness of the administrative justice system?

Full Time Members

A tribunal's requirements for full time or part time members will be influenced by a number of factors related to the volume and complexity of the tribunal's work, the timing and location of its hearings and proceedings and its ability to attract qualified candidates.

The potential benefits of full time appointments include:

- enhanced opportunities for attracting and retaining members where compensation is market-based and competitive;
- greater flexibility for tribunal chairs in managing tribunal operations, including the scheduling of hearings and the assignment of cases due to the full time availability of tribunal members;
- greater access to tribunal members who can contribute to and participate in mentoring, training and peer review;
- greater potential for the development of subject matter expertise and familiarity with client groups and tribunal procedures.

From the same perspective, potential disadvantages of full time appointments include:

- increased difficulties in attracting certain professional groups where skills are in high demand and the compensation that a tribunal can offer is neither market-based nor competitive;
- higher operating costs and lack of flexibility in responding to significant fluctuations in workload;
- less flexibility in determining an optimum resource mix;
- an increased likelihood that incumbents may become "stale" or less effective over time, particularly where there are barriers to the transition of incumbents into other careers and opportunities.

From an individual member's perspective, a full time appointment may represent a career choice that offers a measure of income security, stability and certainty. In some situations, tribunal

members may consider that adjudicative experience is part of a career path to the judiciary or to other adjudicative positions. However, if government policies restrict the number of reappointments a full time tribunal member may accept, individuals may need to consider the opportunity costs and trade-offs associated with these appointments. This may have a chilling effect on the size of the potential pool of applicants.

Part Time Members

An administrative tribunal's requirements for part time members may be influenced by factors related to the regional or local services the tribunal offers, the challenges it faces in recruiting full time members and the likelihood that part time members will either be able to combine tribunal responsibilities with other work or devote themselves fully to tribunal work during the term of a part time appointment.

From a tribunal's perspective, the potential benefits of part time appointments include:

- enhanced opportunities for attracting and retaining individuals from certain specialized professional groups where skills are in high demand and full time appointments would be unattractive because the compensation a tribunal can offer is neither market-based nor competitive;
- a potentially broader field of prospective applicants, ensuring the input of current experience in the subject matter area and the fresh perspective that comes with the infusion of new part time members;
- lower operating costs and greater flexibility in responding to significant fluctuations in workload;
- greater flexibility in determining an optimum resource mix.

From the same perspective, potential disadvantages of part time appointments include:

- increased potential for real or perceived conflicts of interest as part time appointees balance their duties and obligations to the tribunal with their private interests, careers and pursuits;
- less flexibility for tribunal chairs in managing tribunal operations, including scheduling hearings and assigning cases, due to the external commitments and obligations of part time members;
- more difficulty in managing training, in developing and sustaining expertise and in developing consistency in the application of policy.

From an individual member's perspective, a part time appointment may offer an opportunity for flexible work arrangements, an appropriate transition from full time employment to retirement or an opportunity to contribute in a public way in circumstances where a full time appointment would not otherwise be appropriate or acceptable.

Contract Adjudicators

The chairs of some tribunals, for example, the Employment Standards Tribunal, have express authority to retain adjudicators under the terms of contracts negotiated between the parties. Where these powers exist, neither the host minister nor the central institutions of government are involved necessarily in the recruitment and selection process. Full responsibility and accountability for appointments rests with the chairs, subject to any legislative provisions or government directives that generally apply to the appointments in question.

Contract adjudicators may be appropriate where a tribunal provides high-volume services in communities across a wide geographic area, where a range of outcomes is expected and can be tolerated, where the potential impact of decisions in individual cases is not likely to have broad implications for public policy and where a high degree of decision making independence is not required to maintain public confidence in the process.

From a tribunal's perspective, the potential benefits of contract adjudicators include:

- the greatest flexibility in responding to significant fluctuations in workload and in managing caseloads and costs;
- the greatest flexibility in attracting and engaging a broad range of individuals who have the required skills and specialized expertise;
- the most direct and efficient process for recruitment and selection.

From the same perspective, potential disadvantages of contract adjudicators include:

- lack of transparency and accountability in the recruitment and selection process in the absence of external screening and vetting to verify and validate the credentials of potential appointees;
- an increased likelihood of apprehensions of bias and concerns about independence based on the contractual nature of the relationship between the tribunal chair and the adjudicator and their respective duties and obligations.[7]

From an individual's perspective, a contractual arrangement may allow for flexible work arrangements or provide an opportunity for adjudicators to contribute in a public way in circumstances where a full time or part time appointment would not otherwise be appropriate or acceptable.

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[7] See for example, *Doern and Jones* v. *Police Complaint Commissioner*, 2001 BCCA 446 and *Sekela* v. *Police Complaint Commissioner*, 2001 BCCA 572.

Cross-Appointments

Across the provincial public sector, current government policy discourages individuals from holding appointments to more than one provincial agency, board or commission at the same time.[8] While this policy may work well for Crown corporations and community-based advisory boards, it may not be appropriate for administrative tribunals, given the specialized skills that adjudicators need and the investment that tribunals have made in their training and development.

In fact, there are distinct advantages to cross-appointments within the administrative justice system. For example, cross-appointments to administrative tribunals may be appropriate where:

- several tribunals are engaged in adjudication in complementary or interrelated areas of the law (for example, employment law or environmental law);
- the pool of potential adjudicators has broadly-based expertise in this area;
- the application of broadly-based expertise within a tribunal would enhance the overall functioning and effectiveness of the tribunal and the administrative justice system as a whole.

Cross-appointments may also be appropriate where:

- the objective of the recruitment and selection process is to achieve an appropriate balance between the specialized technical or subject matter expertise of some tribunal members and the adjudicative expertise of others; and
- this balance can best be achieved by strengthening the tribunal's adjudicative skills through the cross-appointment of individuals with significant and current adjudicative experience.

From a tribunal's perspective, the potential benefits of cross-appointments include:

- the opportunity to take advantage of transferable adjudicative skills, for example, skills in case management, the conduct of hearings and decision writing;
- the opportunity to draw on and incorporate innovative procedural practices from other tribunals;
- as with part time appointments, greater flexibility in responding to significant fluctuations in workload.

From the same perspective, potential disadvantages of cross-appointments include:

- at least initially, a new appointee's potential lack of specialized technical or subject matter expertise and competency;

[8] Current policy states that "An individual may be appointed to more than one agency, board or commission. However it is recommended that an appointee serve on no more than one at a time unless there are exceptional circumstances such as the need for a unique skill set or a specific project requirement." See "Compensation for Appointees to Government Agencies, Boards and Commissions", British Columbia Treasury Board, Directive 1/00.

- less flexibility for chairs in managing tribunal operations, including scheduling hearings and assigning cases, due to the external commitments and obligations of the individuals holding several appointments.

From an individual's perspective, cross-appointments may offer more varied professional opportunities and additional financial security. Individuals who hold cross-appointments may also contribute to the smoother operations of the system as a whole through the development of a more systematic perspective and practice.

On balance, the practice of making cross-appointments to tribunals should be considered and encouraged in appropriate circumstances.

Selection Criteria and Position Descriptions

Clearly defined selection criteria and position descriptions are essential components of an appointments process that is open, transparent and accountable. Under the Public Agency Appointment Guidelines, the Board Resourcing and Development Office applies the following principles to all appointments to public agencies, boards and commissions:

- **Merit Based:** Appointments will be governed by the overriding principle of selection based on merit - an objective assessment of the fit between the skills and qualifications of the prospective candidate and the needs of the agency.
- **Transparent:** The guidelines for the appointment process will be clear, understandable and available to the public.
- **Consistent:** The appointment process will be applied consistently in respect of appointments to all agencies.
- **Probity:** Agency members must be committed to the principles and values of public service and perform their duties with integrity.
- **Proportionate:** The appointment process will be subject to the principle of proportionality; that is, the process will be appropriate for the nature of the post and the size and weight of its responsibilities.

These principles can and should be applied equally to administrative tribunals, with the addition of a further principle related to selection on the basis of professional contribution, reputation and esteem. This principle is particularly important in choosing tribunal chairs and in circumstances where tribunal members are drawn from a specialized professional field such as medicine or labour relations. In these cases, appointees should be chosen not only on the basis of skills and personal qualities but also on the basis of the contribution they have made to their chosen field, the reputation they have established within that field and the respect they have garnered amongst their professional colleagues, associates and adversaries.

Accordingly, in order to foster excellence in tribunal adjudication, the following principle should be added to the guidelines as a basis for appointments to administrative tribunals:

- **Professional Contribution, Reputation and Esteem:** Appointees with appropriate skills and qualifications will also be assessed on the basis of contribution to their profession, reputation in their chosen field and respect garnered amongst professional colleagues, associates and adversaries.

An administrative tribunal's enabling legislation may specify the professional skills and experience required for particular appointments. For example, the Review Board, established under the *Criminal Code* to assess the fitness of individuals with a mental illness to stand trial, must include a chair who is a judge or who is qualified for appointment as a judge. The Review Board must also include a panel member who is a psychiatrist registered to practice in the province.[9] More often than not, such statutory criteria are limited in nature. Because of these limitations, it is incumbent on either government or administrative tribunals to develop comprehensive profiles of expectations and core competencies.

Until recently, there has not been a routine practice of setting out, in policy, selection criteria and position descriptions across the province's system of administrative tribunals. These tools are important cornerstones of accountability. Selection criteria can be used to establish the baseline qualifications an applicant must meet. They allow the selection panel to evaluate applicants more impartially and to determine which applicants have the basic qualifications necessary to carry out the position's duties.

Position descriptions define the dimensions of a job and the knowledge, skills and personal attributes required to carry out the work successfully. The functions of a position description are to:

- provide applicants with an understanding of what the job requires before applying for or accepting a position;
- provide recruiters, selection panels and tribunal chairs with a benchmark against which the attributes of all applicants can be assessed and against which future performance can be measured;
- reinforce, for the public, the public sector and individual applicants, the enduring principle of appointment on merit.

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[9] The Review Board is constituted under section 672.38 of the *Criminal Code* for the purpose of making or reviewing decisions about individuals who have been accused of a criminal offence and found either not criminally responsible by reason of mental disorder or unfit to stand trial. The statutory qualifications in this instance are more explicit and express than the qualifications for most other administrative tribunals.

While each position is likely to have unique qualities and characteristics, there are also common expectations about core competencies that would apply across the administrative justice system. This is an area where collaboration between administrative tribunals and government would be fruitful, leading ultimately to the identification of core selection criteria and position descriptions.

As discussed earlier in the section on needs assessment, recruitment and selection strategies should be assessed to ensure they meet the following criteria:

Competency

- Will the selection criteria and position descriptions be effective in attracting the most competent individuals to apply for the positions?

Transparency

- Have the requirements for the positions been established objectively?
- Would it be clear to an interested member of the public what the positions entail and what qualifications a person must have to be considered for appointment?

Fairness

- Is there any evidence of unfairness or bias in the way in which the selection criteria and position descriptions are set out?
- Do the selection criteria and position descriptions bear a reasonable and realistic relationship to the needs of the tribunal, the duties to be performed and the environment within which the tribunal operates?

Flexibility

- Do the selection criteria and position descriptions allow for discretion so that well-qualified applicants can be recruited and appointed even if their qualifications are not in strict compliance with the stated requirements?

Affordability/Efficiency

- Will the use of the proposed selection criteria and position descriptions contribute to the effectiveness and efficiency of the recruitment process by clarifying who should and should not apply?

Seeking and Selecting Candidates

An effective recruitment and selection process must attract the best applicants, engage applicants in a screening process that is thorough and fair and lead to appointment decisions that are beyond reproach. Each of these requirements is discussed further below.

The Search

A clear understanding of a tribunal's mandate – coupled with a strong sense of its organizational culture and operating environment – are critical factors in determining how best to attract qualified applicants for positions as tribunal chairs and members. Potential appointees can be identified in a variety of ways, from self-identification to active recruitment by public officials. Discretion on the part of recruiters is essential. In some segments of the administrative justice community, for example, even the hint of a public or shared awareness of who is interested in, or being considered for, a certain position may be prejudicial to both the tribunal and the interested candidate.

Specific search techniques must be chosen to complement and enhance the role and reputation of the administrative tribunals they are designed to serve. These techniques may be simple and straightforward or more time-consuming and complex. They may range from quiet recruitment by word of mouth to elaborate nation-wide searches through search consultants or advertising in newspapers and professional journals. The choice of techniques will be determined by circumstances at the time, including the availability, costs and likely effectiveness of various techniques and the time available to complete the recruitment process. Often a variety of techniques will be selected. Whatever techniques are chosen, the goal is to ensure that the best and most qualified candidates are identified and considered.

Publicizing Vacancies

Vacancies may be advertised on a government or tribunal website, in a newspaper, in a professional journal or in a newsletter circulating within the administrative justice community. If a vacancy is advertised in a public forum, the following considerations should be taken into account:

Method of advertisement

- Will the preferred method of advertisement reach the largest and most appropriate pool of potential applicants?

Closing date

- Will the proposed publication date give potential applicants a reasonable time and opportunity to apply?

Completeness

- Does the proposed advertisement give potential applicants enough information to make a decision about whether they are eligible and interested in being considered, for the position?

Using Existing Inventories

In addition to search techniques that are designed to reach out to as-yet-unidentified candidates, eligibility lists may have been compiled in previous competitions or as part of a centralized bank of information on individuals who have already expressed an interest in particular types of appointments. Existing inventories may be useful as a supplement to direct recruitment if timing is a critical factor or if the position's requirements are of a more common or generic nature. If inventories are compiled, they should be kept up to date and their existence should be made known to those who would use them.

Screening and Interviewing

Screening and interviewing are key components of an effective recruitment and selection strategy. Whether the process involves one or a number of candidates, the overall objective is to ensure that the best candidate is appointed and that this decision can withstand public scrutiny. The screening process itself must treat all applicants with respect and in the same fair, transparent manner.

Choosing a balanced and representative screening panel is also critical. The screening panel should be familiar with the selection criteria, the job description, the functions and mandate of the tribunal and, where appropriate, should participate in the development of the shortlist. It is rarely the paper qualifications of an applicant that are or should be determinative. As the Law Reform Commission of Canada has pointed out:

> *.....one can weigh and total all the "paper qualifications" of respective candidates and still miss crucial attributes, which cannot be quantified – leadership, flair for the task, sensibility and judgment. These qualities will have to be based on reputation, that is, the judgment of friend and foe alike as well as the prospective candidate's likelihood of getting the job done with as little turmoil and acrimony as possible in the circumstances in which it needs doing.*[10]

The choice of screening techniques may include interviews, the review of previous work samples, situational exercises, written tests and the review of past accomplishments and experience. Whatever techniques are selected, the assessment methods must be able to produce results relevant to all the skills and qualifications required.

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[10] Law Reform Commission of Canada. *Independent Administrative Agencies (1980)*, Working Paper 25, pp. 161-62.

Due Diligence

Due diligence must be a formal component of every appointment process. Its purposes are to verify and validate the bona fides of every individual who is being considered for appointment to public office. Depending on the nature and sensitivity of the position in question, appropriate due diligence may involve confidential discussions with colleagues and peers, reference checks, background checks and the external confirmation of credentials and qualifications.

References are an essential source of information about a candidate's character, past performance and accomplishments. In exceptional circumstances, reference checks may be the only source of information on a given qualification. However, reference checks are most often used – and should be used – to corroborate, clarify and add to information that has been gathered from other sources.

Candidates for appointment are often drawn from the community of professional advocates who appear before particular administrative tribunals. These individuals should be chosen not only on the basis of skills and personal qualities but also on the basis of contribution to their profession, reputation in their chosen field and respect garnered amongst professional colleagues, associates and adversaries. It is frequently the chair, rather than the minister or a government official, who is most likely to have appropriate ties to a tribunal's professional community and is thus able to seek out and obtain confidential and frank assessments of a candidate's professional contribution, reputation and esteem. Accordingly, for these tribunals, it may be appropriate to assign responsibility for vetting and due diligence to the tribunal chair rather than to the minister's office, the ministry or a central agency of government. In these circumstances, the role of government should be to ensure that the tribunal chair has carried out the required due diligence.

The Decision

The screening and interview process may lead to one of two types of decisions. On the one hand, the selection panel may have the authority to choose the most suitable candidate and make an appointment or an appointment recommendation directly. On the other hand, the selection panel may be required to send a recommended or ranked list of qualified candidates to the government for final decision and confirmation.

Either way, the decision making process should be concluded in as timely a fashion as possible, with appropriate notices and communications to the successful appointees, the other candidates, the administrative tribunal, its staff and the wider community of stakeholders.[11]

Assessing the Recruitment and Selection Process

An assessment of the recruitment and selection process should be carried out on a regular basis and should address the following questions:

Competency

- Did the process allow for the identification, recruitment and screening of the best candidates for the positions?

Transparency

- Were the steps in the recruitment and selection process established objectively?
- Would it be clear to an interested member of the public how and when the positions would be filled?

Fairness

- Did all qualified applicants have an opportunity to be considered for the positions?

Flexibility

- Did the recruitment and selection process have the flexibility required to address any unexpected contingencies that arose?

Affordability/Efficiency

- Was the recruitment and selection process cost effective in light of its outcome?

Recommendations for Recruitment and Selection

In order to support the development of an orderly recruitment and selection process, it is recommended that an annual appointment plan be prepared for each administrative tribunal setting out in advance:

- **the respective roles and responsibilities of government and tribunals;**
- **the number of vacancies anticipated in a given year including the number to be filled by recruitment efforts and renewals;**
- **the types of positions to be filled, whether chairs or members and whether full time or part time;**

[11] The current policy of the Board Resourcing and Development Office is to finalize appointments 30 days prior to their effective date in order to allow lead time from training and orientation.

- **the kinds of recruitment and outreach activities that will be required, including their potential costs;**
- **the critical timelines from initiation to completion for key deliverables and appointment decisions.**

Within the framework of the annual appointment plan, it is recommended that a needs assessment be prepared or updated each time tribunal appointments are required.

It is recommended that tribunals have the capacity to make a variety of appointments tailored to meet their individual needs and circumstances. Where appropriate, it should be possible to make appointments on a full time, part time or contractual basis. Further, cross-appointments should be encouraged where the required adjudicative expertise is transferable and it would not be contrary to the public interest to do so.

It is recommended that job descriptions be developed for administrative tribunal appointees.

It is recommended that recruitment and selection be based on open, transparent and competitive processes that are proportionate to the nature of the position being filled and subject to monitoring and auditing by the Board Resourcing and Development Office.

TERMS AND CONDITIONS OF APPOINTMENT

Administrative tribunals are subject to the inherent supervisory jurisdiction of the courts. Over the course of many years, courts have exercised this jurisdiction by reviewing tribunal decisions to determine whether tribunals have acted within the limits of their legal mandates and whether, in reaching their decisions, tribunals have complied with the principles of natural justice.[12] Recently, courts have also been asked to rule on whether the form and manner of an individual's appointment to an administrative tribunal has the necessary indicia of institutional independence to protect the appointee from the real or perceived influence of the executive branch of government. Central to the most recent cases are questions about an appointee's security of tenure and financial security.[13]

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12 The role of the courts in reviewing the decisions of administrative tribunals is the subject of a separate background paper, Standard of Review on Judicial Review or Appeal, released in December 2001, and a report, Providing Administrative Tribunals with Essential Powers and Procedures, released in July 2002. Both are available through the Administrative Justice Project's website at http://www.gov.bc.ca/ajp.

13 See, for example, *Ocean Port Hotel Ltd.* v. *British Columbia* 2001 S.C.C. 52, *Wells* v. *Newfoundland* (1999), 46 C.C.E.L. (2d) 165 (S.C.C.), 2747 – 3174 *Quebec Inc.* v. *Quebec (Regie des permis d'alcool)*.

The relationship between the independence of tribunal members in exercising their quasi-judicial powers and the overall accountability of tribunal chairs to government for the effective management and operation of administrative tribunals, raises significant policy questions for government. In this respect, courts have asked, and in some respects have answered, the following questions:

- How should tribunal members be appointed and by whom?
- What is the appropriate length and form of their tenure?
- When can a tribunal member be removed from office and by what means?

Until recently, government did not have the benefit of the courts' perspective as a guide to the answers to these types of questions. In fact, legislation was often developed on a case-by-case basis. In the majority of circumstances, statutory provisions for term and tenure were more likely to reflect the perspectives of the individuals drafting the legislation than the considered or systematic perspectives of a larger or more representative group of public policy makers. As a consequence of this ad hoc approach, an extraordinarily diverse array of provisions for term and tenure is now in place.

Given this history, it is timely and appropriate to carry out a critical examination of current circumstances and to identify principles supporting a more transparent, coherent and comprehensible approach to term and tenure in administrative tribunals.

Term and Tenure

Provisions governing term and tenure for tribunal appointees are found in a variety of instruments including:

- a tribunal's enabling legislation;
- legislation of general application (*Interpretation Act*, *Public Service Act*, *Public Service Benefit Plan Act*, *Public Sector Employers Act*);
- Orders in Council and ministerial orders;
- regulations and directives;
- policy documents that set out government's expectations with respect to administrative matters.[14]

The most common forms of tenure are appointments at pleasure, appointments during good behaviour and appointments for fixed terms. In a limited number of cases, an appointment to an administrative tribunal may run for the course of an appointee's working life.

General Provisions for Term and Tenure – the *Interpretation Act*

The *Interpretation Act* is a general statute that applies where no other statute has express provisions covering the same matters. Sections 20 and 22 of the Act deal with the appointment and tenure of public officers who include, by definition, the chairs and members of the province's administrative tribunals. Sections 20 and 22 apply to any appointing authority whether Cabinet, the host minister or the tribunal chair.

If a tribunal's enabling legislation is silent on the issue of appointments or is incomplete or unclear, the *Interpretation Act* sets out, completes or clarifies the powers of the appointing authority to determine an appointee's term and tenure.

Section 20(1) of the *Interpretation Act* establishes a presumption that, unless otherwise specified in an agency's enabling legislation, public officers hold office during pleasure.

The authority to appoint a public officer also includes the authority to set the terms and conditions of the appointment. If Cabinet or a minister has the authority to appoint the chair of an administrative tribunal, the same party also has the authority to set terms and conditions. Section 22 of the *Interpretation Act* provides:

> 22 Words in an enactment authorizing the appointment of a public officer includes power to do the following:
>
> (a) set his or her term of office;
>
> (b) terminate his or her appointment or remove or suspend the public officer;
>
> (c) reappoint or reinstate the public officer;
>
> (d) set the public officer's remuneration and vary or terminate it;
>
> (e) appoint another in his or her place or to act in his or her place;
>
> (f) appoint a person as the public officer's deputy.

Appointments At Pleasure

The concept of "at pleasure" appointments is an old one. An appointment during pleasure, with no other express appointment terms, means that the appointment has no set term and that the appointing order may be rescinded at any time without notice, cause or compensation. An appointment at pleasure offers little or no formal security of tenure, although it may run indefinitely in the absence of an express expiry date in the appointing instrument.

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[14] See, for example, Government Management Policy Summary, (March 1998), Treasury Board Directive 1/00 (pursuant to Sections 4 and 27 of the *Financial Administration Act*).

A number of statutes do not set express appointment terms. For tribunal members or chairs appointed under these statutes, appointment terms would be either at pleasure (by virtue of the operation and application of section 20 of the *Interpretation Act*) or for a term fixed by the appointing authority (under section 22 of the Act).

Some examples of statutes without express appointment terms are:

> ***Assessment Act*** (Property Assessment Appeal Board)
>
> 43(6) The Lieutenant Governor in Council may determine the terms of appointment, duties and remuneration of members, and the terms, duties and remuneration may be different for different members.
>
> ***Petroleum and Natural Gas Act*** (Mediation and Arbitration Board)
>
> 19(1) The Mediation and Arbitration Board is continued, consisting of a chair, vice chair and no more than 7 other members, each appointed by the Lieutenant Governor in Council....
>
> ***Motor Carrier Act*** (Motor Carrier Commission)
>
> 31(1) The Motor Carrier Commission is continued, consisting of not less than 7 persons who are to be appointed by the Lieutenant Governor in Council and hold office during pleasure....
>
> (8) The Lieutenant Governor in Council must set the remuneration of the commissioners and the terms and conditions of their appointments.

It has been argued that, where a person is appointed as an adjudicator at the pleasure of the executive branch of government, that person does not have the degree of independence necessary to carry out his or her adjudicative functions in an appropriate manner – that is, in an impartial way and at arm's length from the executive. The Law Reform Commission of Canada in its 1980 working paper on independent administrative agencies characterized this dilemma in the following way:

> *Unlike judges, who are appointed during good behaviour to a statutory age of retirement, members of most independent agencies are appointed for diverse terms pursuant to the various enabling Acts; those who are not may be appointed "at pleasure". This can create uncertainty in the minds of agency members concerning subsequent employment opportunities. The fact that the career of the member of an agency may depend upon other government appointments together with the fact that the Cabinet itself determines salary ranges and annual increments, means that agency members may feel (or may be thought by the*

> *public to feel) subjected to heavy political pressures owing to their ongoing scrutiny by the government of the day.*[15]

The Supreme Court of Canada in *Ocean Port Hotel v. British Columbia* considered whether the practice of appointing members at pleasure to British Columbia's Liquor Appeal Board was inconsistent with the standard of independence required by the *Liquor Control and Licensing Act*. In a unanimous decision of the court, Chief Justice McLachlin stated:

> *In my view, the legislature's intention that Board members should serve at pleasure, as expressed through s. 20 (2)(a) of the Act, is unequivocal. As such, it does not permit the argument that the statute is ambiguous and hence should read as imposing a higher degree of independence to meet the requirements of natural justice, if indeed higher standards is [sic] required. It is easy to imagine more exacting safeguards of independence – longer, fixed-term appointments; full time appointments; a panel selection process for appointing members to panels instead of the chair's discretion. However, in each case one must face the question: "is this what the legislature intended?" Given the legislature's willingness to countenance "at pleasure" appointments with the full knowledge of the processes and penalties involved, it is impossible to answer the question in the affirmative…Where the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence, however inviting it may be for the Court to do so.*[16]

However, the court also noted that different considerations may apply to administrative tribunals which engage a *Charter* right to an independent tribunal under sections 7 or 11 (d).[17]

Appointments during Good Behaviour

An appointment "during good behaviour" means that an incumbent may only be removed from office for cause or incapacity. Unlike an appointment at pleasure, where removal is at the discretion of government, an appointment during good behaviour offers a high degree of security of tenure.

Appointments during good behaviour are not common in the provincial public sector. Section 17 of the *Provincial Court Act* establishes this standard for provincial court judges. Members of the purchasing commission, a public body outside the Terms of Reference for the Project, are appointed during good behaviour.

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15 See Law Reform Commission of Canada, supra., pp. 163-164.

16 *Ocean Port Hotel v. British Columbia*, 2001 S.C.C. 52, at para. 27.

17 Ibid., at para 29.

The Public Service Appeal Board is the only provincial administrative tribunal whose members are appointed during good behaviour. Significantly, though, the length of the term is limited to three years. Section 16 of the *Public Service Act* provides that:

> 16(3) A member of the appeal board appointed under subsection (2) holds office during good behaviour for a term not exceeding 3 years and serves on a full or part time basis as the Lieutenant Governor in Council may order.

In a 1995 review of federal administrative agencies, the Honourable Marcel Masse observed that appointments during good behaviour are normally reserved for members of "quasi-judicial or administrative tribunals which have adjudicative functions...where independence from government is crucial".[18] Masse recommended that appointees to most administrative agencies continue to serve at pleasure and that appointments during good behaviour be limited to those public offices where the need for independence and impartiality justifies it. No formal legislative steps were taken by Parliament to implement Masse's recommendation, although current federal policies permit both at pleasure appointments and appointments during good behaviour.[19]

Term for a Working Life

"Term for a working life" means that an incumbent remains in office until a prescribed age. Term for a working life is extremely rare in the provincial public sector but is permitted in statutes such as the *Coroners Act*. Section 1 of that Act provides:

> ***Coroners Act*** (Coroners Service)
>
> 1(2) A coroner ceases to hold office on reaching 65 years of age, but the Lieutenant Governor in Council may extend the coroner's term for any period not beyond the date of the coroner's 70th birthday.

When combined with an appointment during good behaviour, term for a working life offers the highest level of independence and greatest security of tenure available to a public officer under provincial legislation. Provincial court judges enjoy this form of term and tenure. They are appointed during good behaviour and remain in office until they reach 70 years of age.

The Supreme Court of Canada recently awarded damages to a person appointed to an administrative board during good behaviour until the age of 70 years. The appointment ended

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[18] Marcel Masse. Agency Review: Final Report. Ottawa: Office of the President of the Queen's Privy Council of Canada, February 1995, p. 5.

[19] Canada. "Terms and Conditions of Employment for Full time Governor in Council Appointees", June 1997.

prematurely after the board was reconfigured by legislation.[20] The court found an employment-like relationship between the government and the appointee and applied general principles of contract law to the relationship. In essence and subject to a duty to mitigate, the appointee was entitled to compensation to the end of the term and to damages for breach of contract in the absence of an express legislative provision that removed his right to compensation.

Fixed Term Appointments

By far the most common approach to appointment terms is to fix them, either in legislation or in the terms of an appointing order or agreement. The length of the fixed term varies, generally within a range of three to six years. Under some statutes, there may also be an upper limit on the number of times an individual can be reappointed.

The following examples illustrate how fixed terms have been addressed in the enabling statutes for several administrative tribunals:

> ***Expropriation Compensation Act*** (Expropriation Compensation Board)
>
> 53(2) The chair and vice chair
>
> (a) must be appointed for a 5 year term, and
>
> (b) may be reappointed for further terms, none of which may exceed 5 years.
>
> ***Financial Institutions Act*** (Financial Institutions Commission)
>
> 202(4) The chair and the other members of the commission appointed by the Lieutenant Governor in Council may be appointed
>
> (a) on conditions, including remuneration, and
>
> (b) for terms of office, each not exceeding 3 years, that may vary for different members.
>
> ***Land Reserve Commission Act*** (Land Reserve Commission)
>
> 4(5) The term of office of a member is during pleasure but, except for the chair, must not exceed 4 years.

The courts have found that adjudicators need not have the same security of tenure as judges in order to effectively safeguard their independence and impartiality. In articulating this principle,

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[20] *Wells* v. *Newfoundland* (1999), 46 C.C.E.L. (2d) 165 (S.C.C.).

the Supreme Court of Canada ruled in 1996 that:

> *The minimum requirements for independence do not require that all administrative adjudicators, like judges of courts of law, hold office for life. Fixed term appointments, which are common, are acceptable. However, the removal of adjudicators must not be simply at the pleasure of the executive.*[21]

The Ontario Court of Appeal recently considered the relationship between fixed term appointments and the power to remove at pleasure. The court found that three vice chairs of the Ontario Labour Relations Board were entitled to financial compensation, but not to reinstatement, when their three-year appointments were revoked mid term.[22] As a matter of statutory interpretation, the court held that the general legislative power to appoint and remove at pleasure was superceded by a provision in the Order in Council appointing the vice chairs for fixed terms. In this respect, there appears to be emerging judicial support for appointments to administrative tribunals that are made for fixed terms and that continue during good behaviour rather than at pleasure.[23]

While the courts have determined that some appointments with fixed terms provide the safeguards necessary to protect the independence of adjudicators, this question has not been fully and finally resolved. In a case that was, at the time of this writing, the subject of an application for leave to appeal to the Supreme Court of Canada, the Montreal Bar Association has challenged the provisions of Quebec's provincial tribunal on the grounds that the combination of a five year initial term and a process for reappointment do not provide sufficient guarantees of independence.[24]

Staff Appointments

The focus of this report is on the appointments of chairs and members to administrative tribunals. However, there is also a wide variation in practice for the appointment of administrative tribunal staff, particularly with respect to whether the *Public Service Act* applies and whether and to what extent the provisions of public sector pension and benefits legislation apply. This area should be examined and reviewed in the future.

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21 2747 – 3174 *Quebec Inc. v. Quebec (Regie des permis d'alcool)* (1996), 140 D.L.R. (4th) 577 (S.C.C.).

22 *Hewat* v. *Ontario* (1998), 35 C.C.E.L. (2d) 32 (Ont. C.A.).

23 Katrina M. Wyman discusses several recent cases in "The Independence of Administrative Tribunals in an Era of Ever Expensive Judicial Independence" (2000/2001) 14.1 C.J.A.L.P. at pp. 108 - 111.

24 *Barreau de Montreal* c. *Quebec (Procureur general)* (1999), [2000] R.J.Q. 125 (S.C. Quebec).

Assessing the Framework for Term and Tenure

The earlier standard of appointments at pleasure has given way to a more widespread use of fixed terms as the basis for appointments to administrative tribunals. A number of factors have contributed to this shift. First has been the recognition that appropriate tenure is necessary in order to attract and retain the highly skilled practitioners who make the system of administrative justice work. Second has been the development of case law enhancing and supporting the independent, quasi-judicial functions of administrative tribunals and the need to provide security of tenure for tribunal decision makers. Third has been maturing and professionalization within the administrative justice system itself. While there is certainly a strong element of public service in the work that adjudicators do, there is also an emerging awareness that, like their counterparts in the senior ranks of the public service and on the bench, full time adjudicators make significant career choices and commitments when they accept appointments to administrative tribunals. In addition, they must possess specialized expertise and competence in order to carry out their adjudicative duties and responsibilities effectively.

The current approach to term and tenure across the administrative justice system is inconsistent, confusing and uncertain. The immediate challenges for government are to:

- establish a framework for term and tenure that will allow individual tribunals to achieve the appropriate balance between the adjudicators' need for independence in decision making and the public sector's need for administrative accountability;
- ensure that ministers, ministry staff and appointees share a clear and common understanding of appointment terms, expectations and obligations.

Balancing the Values of Independence and Accountability

The first and most fundamental step in establishing an effective framework for appointments is to specify the appropriate term and tenure for the chairs and members of the province's administrative tribunals. Term and tenure need not be the same for the chair and the tribunal's members or for each tribunal member. Similarly, term and tenure need not be the same across all tribunals. However, as a matter of principle, every person who accepts an appointment to an administrative tribunal should know with certainty how long the term will be, whether and on what conditions the term can be renewed and how and under what circumstances the term can be ended. In this respect, government should establish principles for term and tenure and guidelines for their application. Host ministers and tribunal chairs can then determine how those principles and guidelines are to be applied in individual circumstances.

The specific characteristics of each tribunal and the environment within which the tribunal operates will have a significant influence on decisions about what terms and tenure are appropriate. For example, a tribunal might make a considerable investment in training its adjudicators and then not realize the full potential of that investment if adjudicators, who build up significant experience and expertise, are then lost to the system because terms are short and opportunities for renewal are limited.

In this respect, circumstances that support shorter or nonrenewable terms would include:

- the ready availability of a large pool of individuals with the interests, skills and qualifications the tribunal's work requires;
- the ready availability of suitable individuals who do not need extensive training or orientation to become effective tribunal members;
- a workload that involves more generic issues of a less technical or specialized nature;
- a decision making environment where discretion is relatively narrow or the opportunities for its exercise are clearly defined in the relevant legislation and policy;
- an environment where a range of outcomes is expected and can be tolerated.

Circumstances that support longer or renewable terms would include:

- a known shortage of individuals with the interests, skills and qualifications the tribunal's work requires;
- a knowledge that new appointees require extensive training and orientation;
- a knowledge that all appointees require ongoing opportunities for the development and maintenance of professional or technical competence;
- a workload that involves legal issues or highly technical issues of a specialized nature;
- a decision making environment where discretion is broad and the opportunities for its exercise are not precisely defined in the relevant legislation and policy; .
- an environment where a range of outcomes is undesirable or cannot be tolerated.

Developing Shared Understandings about Terms, Expectations and Obligations

The second step in establishing an effective framework for appointments is to ensure that appointing instruments set out clear terms, expectations and obligations. At present, there is a decided lack of coherence and clarity in approaches to term and tenure for tribunals, whether set out in legislation or as implemented in practice.

Uncertainty works to the disadvantage of both appointees and government. It causes delays, increases costs and leaves open the possibility of unnecessary litigation. The potentially arbitrary and uncertain characteristics of appointments at pleasure can lead to the adoption of what are essentially private arrangements, establishing additional terms for tenure and compensation in the event of termination. Furthermore, in the absence of the application of sound management

principles to issues of term and tenure, it is often unclear how a tribunal's adjudicative independence and administrative accountability can be made to work in a practical and realistic way.

It may very well be necessary and appropriate, from a public policy perspective, to provide discretion in defining precise conditions for term and tenure in order to respond effectively to prevailing market conditions in certain sectors. However, the overriding goals of transparency and openness will not be realized – or will be frustrated – where the framework for term and tenure does not support the application of sound management principles. Appointees, host ministers and their staff need clarity about appointment terms and conditions and the public should demand no less.

Reappointments

Unless appointments are open-ended, with no term specified, questions about reappointments will arise and recur. As a general principle, reappointment decisions should be linked to a tribunal's overall retention and succession strategies and be made in a timely, fair way. Performance evaluations are also essential and should be considered before reappointment decisions are made.

The Role of the Chair

British Columbia's Public Agency Appointment Guidelines state that, as a general rule, the chairs of public agencies should be involved in the reappointment process, providing advice as to whether an appointee has performed satisfactorily and should be considered for reappointment.

The role of a tribunal chair in the reappointment process should be clearly defined, strong and parallel to the chair's role in recruitment and selection. Professional expertise and competence are core requirements for tribunal members and chairs are in the best position to:

- appreciate the independent adjudicative role of tribunal members;
- evaluate the members' performance in those roles;
- advise government on whether and for how long appointments should be renewed.

In certain circumstances, it may also be appropriate for a tribunal chair to recommend the addition of specific performance-related terms and conditions to an appointing order or agreement.

Reappointment Policies

The Public Agency Appointment Guidelines state that, under normal circumstances, individuals may be appointed for an initial term of one year and may be eligible for reappointment for two further terms of two and three years each. The guidelines also suggest that there may be circumstances where it would be appropriate to consider extensions beyond six years.

In a 1990 report to the Canadian Bar Association on the independence of federal administrative tribunals, Ed Ratushny raised, but did not answer, the following questions about appointments and reappointments:

> *Is there a possibility, towards the end of a term, that decision making will be guided by the thought of re-appointment? What steps might be taken to guard against that possibility? Is it fair to bring someone to a job, perhaps from across the country, and, in the absence of cause, not to renew his or her term?*[25]

Several Canadian provinces, New Zealand and the United Kingdom have adopted the practice of limiting the number of times an individual may be reappointed to an administrative tribunal. More often than not, policy specifies a maximum term of 10 to 15 years.

In contrast, the Australian Administrative Review Council concluded that the advantages of permitting successive reappointments outweigh the advantages of restricting reappointments – provided that selection criteria are public and open competitions are held. The council recommended that tribunal members seeking reappointment be required to reapply on the expiry of their terms in a competitive selection process. As recommended by the council, incumbents would then be assessed for suitability against the same selection criteria as new applicants.[26]

These examples illustrate the diversity of views about what should happen when an appointment expires. Certainly, the enabling legislation for administrative tribunals offers little by way of consistency in approach and no clear consensus could be said to have emerged from recent discussions about these issues with public officials, tribunal chairs and members. At a minimum, however, tribunal chairs should have some means of evaluating performance as a basis for advising government on reappointments.

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25 Ed Ratushny. Report of the Canadian Bar Association Task Force on the Independence of Federal Administrative Tribunals and Agencies in Canada, September 1990, p. 21.

26 Australia Administrative Review Council. "Report to the Minister of Justice. Better Decisions: Review of Commonwealth Merits Review Tribunals", Report No. 39, August 1995, p. 84.

Initial or Probationary Appointments

It may be desirable to make short-term appointments of a probationary nature at the outset so appointees and tribunals can mutually assess their compatibility and fit. This approach can accommodate a graceful and respectful exit for an appointee when there is not a good fit.

At least one administrative tribunal has adopted a practice of entering into probationary-style agreements with potential candidates outside its formal appointment structure. Candidates who perform well are then recommended for formal appointments at the end of their probation. This practice reflects the interest that some administrative tribunals have in providing a formal opportunity for early reassessment when subsequent appointments have long or unspecified terms.

If initial or probationary appointments are considered, care should be taken to ensure that these appointments are consistent with requirements for independence and security of tenure.

Subsequent Appointments

The authority to reappoint to subsequent terms may be set out in enabling legislation. Where the statute is silent, renewal is at the discretion of the appointing authority. The three examples which follow illustrate the range of provisions currently found in enabling statutes for the province's administrative tribunals:

> **Reappointment prohibited** - *Parole Act* (Board of Parole):
>
> 2(4) A member of the board must not be reappointed except as chair.
>
> **Reappointment permitted for one term only** - *Human Rights Code* (Human Rights Tribunal):
>
> 31(5) A member of the tribunal is eligible to be reappointed for one additional term of five years.
>
> **Reappointment permitted for an unspecified number of additional terms** - *Utilities Commission Act* (Utilities Commission):
>
> 2(3) A person whose service as a commissioner has ended may be reappointed.

Reappointments and Performance Reviews

The expiry of a time-limited appointment may provide the impetus for a host minister or tribunal chair to carry out a performance review. While it is certainly appropriate to carry out a performance review before a time-limited appointment is renewed, this is not the only time when

performance should be addressed. In fact, timing a performance review to coincide with the expiry of an appointee's term may indicate unwillingness or reluctance on the part of a tribunal chair to take a proactive role in tribunal management.

Performance reviews should be an integral part of every tribunal's ongoing accountability. As a matter of sound policy and best practices, the timing of performance reviews should not be linked exclusively to the timing and cycle of reappointments. In this respect, if legislative amendments are required to clarify the management roles and responsibilities of tribunal chairs, this is the preferred route to ensure full and proper accountability.

Notice of Decision not to Reappoint

It is not uncommon for administrative tribunals and appointees to experience great uncertainty as appointment terms draw to a close. In some circumstances, appointments have been known simply to lapse. Some uncertainty is inevitable as Cabinet is often involved in making final decisions. However, most such Cabinet decisions are based on recommendations from ministers, staff or tribunal chairs – and these recommendations can usually be made well in advance and communicated, on a confidential basis at least, to affected appointees and tribunals.

The basic principles of fairness that inform tribunals' work should also attach to decisions not to reappoint. Appointees, particularly in full time positions, should have as much advance notice as possible if recommendations are going forward not to reappoint. As part of its draft Appointment Agreement, the province of Ontario has proposed a notice period of three months and stipulated that, if notice is not given, full time appointees are entitled to remuneration for three months from the date their terms expire. Under the Ontario proposal, similar provisions would apply on a pro-rated basis to part time appointees.

While Ontario has not implemented its draft Appointment Agreement, Quebec has enacted legislation establishing notice requirements for both government and tribunal appointees. Section 48 of the *Administrative Justice Act* provides that:

> 48. The term of office of a member shall be renewed for five years:
>
> (1) unless the member is notified otherwise at least three months before the expiry of his term by the agent authorized thereof by the government;
>
> (2) unless the member requests otherwise and so notifies the minister at least three months before the expiry of his term.[27]

[27] *An Act Respecting Administrative Justice*, 1996 R.S.Q., c. 54.

Acting or Interim Appointments

In limited circumstances, the capacity to make a short-term, interim appointment would be desirable. It would allow tribunals to adapt to sudden or unexpected changes, to maintain operations through a transitional period or to accommodate approved leaves of absence. Within a broader context of independence and accountability, enabling legislation should provide for this kind of operational flexibility.

Matters Pending when Appointment Ends

Administrative tribunals deal with matters that may be put over or continued at a later time. It is a fundamental principle of fairness that the same adjudicator or panel hear and deal with all of the evidence in each case. Once a hearing has commenced, the matter must either be heard and decided by the same adjudicator or panel or be adjourned and started again.

Appointments can expire before a hearing is concluded. When this happens, it is essential for the tribunal's members to have the capacity to continue their duties until the pending matter is completed. The following examples illustrate how these issues have been addressed for workers' compensation appeals and in matters before the Expropriation Compensation Board:

> ***Workers Compensation Act*** (Appeal Division)
>
> 86(6) Where an appeal commissioner resigns or his or her appointment terminates, he or she may carry out and complete his or her duties and responsibilities and continue to exercise his or her powers as an appeal commissioner, in relation to a proceeding in which he or she participated, until the proceeding is completed.
>
> ***Expropriation Act*** (Expropriation Compensation Board)
>
> 53(7) The chair, vice chair or any other member of the board who resigns his or her appointment or whose term on the board expires may, after the resignation or expiry of the term,
>
> (a) give judgment in a hearing in respect of which he or she was, while holding office, sitting as a member of or presiding over the panel appointed under subsection (4), and the judgment is valid and effective as though he or she still held office,
>
> (b) continue with the hearing of any matter referred to in paragraph (a), and the jurisdiction to hear the matter and give judgment is valid and effective as though he or she still held office.

Assessing the Framework for Reappointments

The institutions of administrative justice have matured, bringing with them a professional cadre of administrative law specialists who appear before them or serve as tribunal adjudicators. The way

in which these professionals are appointed has been largely unaffected by the process of growth and maturation.

It is time to rethink why individuals continue to be appointed and reappointed to serve on tribunals using old, cumbersome and possibly inappropriate practices. Tribunals need to be accessible to the people they serve. They also need highly skilled professional and technical decision makers who make career choices and commitments when they accept tribunal appointments.

Tribunals invest significant time and public resources bringing new appointees to full productivity. Unless new appointees have served previously in an adjudicative capacity in similar tribunals, it is unlikely that their previous training and experience will have encompassed the broad range of skills required to be an effective adjudicator. To address these issues, tribunals will often provide internal mentoring, or support external training programs, to familiarize new appointees with the fundamental principles of administrative law, effective decision writing and administrative practices and procedures. Significantly, in British Columbia, these training programs have been developed by the administrative tribunals themselves through their own initiatives, efforts and associations.

In circumstances where two or three years' experience is required before a tribunal member becomes fully productive, an appointment policy based on terms of five years or less with no renewals can be at least inefficient and quite possibly counterproductive. Such policies may well be appropriate for community-based boards and public advisory bodies where more generalized skills, knowledge and perspectives are required. However, obvious questions arise when these policies are applied to specialized decision making bodies like administrative tribunals.

Choosing the right approach is always a question of balance. Tribunals need renewal and fresh ideas. They also need continuity, stability and the long view that develops through lengthy appointments and tenure. In the normal course of daily and professional life, people move and move on. They change communities, they change careers and they change what they do. In this respect, the question for government is whether it is necessary to establish timelines for administrative tribunal renewal through its powers to limit reappointments or whether it is acceptable to leave the timing of renewals to the normal ebb and flow of professional life. Put another way, the question for government is why it is necessary to make specific provisions for the term of appointments to administrative tribunals when similar provisions are not in place for either the professional public service or the courts. In fact, for both the professional public service and the courts, it is understood and widely accepted that incumbents have indefinite tenure.

The basic principles that apply to decisions about the length of appointments also apply to decisions about whether reappointments should be permitted or considered. These principles are discussed in detail in the Term and Tenure section of this report. In addition, it may be desirable to limit the number of reappointments where there is likelihood that, over time:

- adjudicators will become stale, captive or biased in favour of a particular group of clients or stakeholders;
- as a matter of policy, opportunities for participation should be opened to a wider community or to the public generally.

Similarly, it may be desirable to encourage long-term renewable appointments where there is likelihood that, over time, ongoing appointments will:

- enhance a tribunal's ability to recruit and retain members;
- enhance the tribunal's capacity for decision making, by capitalizing on and protecting its investments in adjudicator training;
- be more efficient and less time-consuming to administer.

Termination and Severance

The distinction between individuals appointed at the pleasure of the Crown and individuals hired under the terms of an employment contract is significant, particularly as it applies to termination and severance. For individuals appointed at pleasure, appointments can be terminated at any time without cause, notice or compensation. In contrast, an employment relationship can only be terminated in accordance with the provisions of the contract and any other applicable laws of general application. In British Columbia, these include the common law, the *Employment Standards Act* or the *Public Sector Employers Act*. For most employees, termination without cause normally requires notice or severance in lieu of notice.

At common law, all public officials were initially deemed to be appointed at pleasure. Over time and with the unionization of the public service, employment contracts have replaced the common law conditions of at pleasure appointments for many public officials. In recent years, the distinction between at pleasure appointees and public sector employees has been blurred in a number of ways. First, the legislature has modified the essential character of at pleasure appointments by introducing the notion of at pleasure appointments for fixed terms and by giving appointing authorities the power to set additional terms and conditions. Second, appointing authorities and at pleasure appointees have entered into agreements with many of the hallmarks of employment contracts. Third, the courts have intervened to provide remedies for at pleasure appointees who were terminated before the end of their fixed terms or were terminated contrary to other conditions of their appointing agreements. Very recently, the Supreme Court of Canada

inferred a contract of employment in the terms of an order appointing an individual to a provincial administrative board.[28]

As a consequence, it is now common for appointees to administrative tribunals to negotiate appointment agreements on an individual basis without reference to consistent, clear or comprehensive policies and standards. In the result, government has no ready capacity to assess or account for its overall potential liability for early terminations and severance.

Severance – Definition and Application

Within the employment law context, severance means "a payment made in lieu of the notice period".[29] Notice and severance are not required when:

- an employee is terminated for cause;
- an employment contract with a definite term comes to an end;
- an employee resigns voluntarily or retires.

The extent of government's general obligation to pay severance to members of administrative tribunals has not been addressed completely and directly, either by the courts or by the legislature.

On the one hand, courts have established the principle of institutional independence for members of administrative tribunals. This principle includes security of tenure and financial security, both intended to protect tribunal members from dismissal without cause by the executive branch of government. While the courts have determined that different considerations may apply to tribunals which engage a *Charter* right to an independent tribunal under sections 7 or 11 (d), it cannot be determined with certainty at this time:

- which tribunals have jurisdiction to apply and interpret the *Charter* and hence which tribunal members would be subject to the court's protection in the event they were terminated without cause;
- whether and to what extent other tribunals also require institutional independence and security of tenure.

On the other hand, the *Public Sector Employers Act* and the Employment Termination Standards Regulation[30] establish severance standards for many non-unionized employees in the public sector. These standards adopt common law principles for severance and override any

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28 See *Wells* v. *Newfoundland*, (1999), 46 C.C.E.L. (2d) 165 (S.C.C.).

29 See for example section 5(2) of the Employment Termination Standards Regulation, B.C. Reg. 379/97.

30 B.C. Reg. 379/97.

inconsistent severance provisions in agreements negotiated between the parties. Maximum severance in lieu of notice is 24 months and terminated employees have a duty to mitigate.

Although the *Public Sector Employers Act* does not apply to justices or to individuals covered by collective agreements, it has not been established with certainty how the Act applies to individuals appointed to administrative tribunals. In the absence of express legislation setting out the severance obligations of government, existing contractual arrangements between appointing authorities and tribunal members are, subject to a duty to mitigate, most likely enforceable.

In moving forward to more open and transparent appointment practices, government should address whether and to what extent it is appropriate to implement common severance standards for administrative tribunals. These standards can be set through policy, through individual enabling statutes or, in a general way, through amendments to the *Public Sector Employers Act*.

Authority to Terminate Appointments

In most circumstances, the person who has the power to appoint also has the power to dismiss. Members of administrative tribunals appointed by Cabinet may be removed from office by Cabinet and ministerial appointments may be rescinded by ministers. Exceptions are rare and must be set out expressly in legislation. For example, under the *Workers Compensation Act*, appeal commissioners negotiate agreements with the chief appeal commissioner but, once appointed, they may only be removed from office for cause by the governors.

> ***Workers Compensation Act*** (Appeal Division)
>
> 85(4) An appeal commissioner other than the chief appeal commissioner must be appointed for a term agreed on between the appeal commissioner and the chief appeal commissioner and is eligible for reappointment or extension of his or her appointment, but may be removed by the governors at any time for just cause.

The effect of this provision is to enhance security of tenure for appeal commissioners by transferring authority for termination decisions from the chief appeal commissioner, where it would otherwise reside, to the full board of governors.

Within the administrative justice system, the most secure form of tenure is given to the chair of the Labour Relations Board. While the chair is appointed by Cabinet, section 131 of the *Labour Relations Code* authorizes removal only by the legislature.

***Labour Relations Code* (Labour Relations Board)**

> 131(1) The chair shall hold office for a term of not less than five years specified by the Lieutenant Governor in Council and shall not be removed before the expiration of that term except by an Act or resolution of the Legislature.

Grounds for Terminating Appointments

The timing and grounds for terminating appointments to administrative tribunals are diverse and include terminations:

- at any time without cause, notice or compensation;
- at any time for cause, with or without notice;
- at any time for misconduct, neglect of duty or incapacity;
- at the end of a prescribed term of appointment.

In individual cases, precise grounds for termination must be determined by examining the enabling legislation, the appointing order and any related appointment agreements. Confusion arises when there is conflict or inconsistency between general terms set out in an Act or Order in Council and more specific terms negotiated as part of an appointment agreement. The courts have confirmed that at pleasure appointments may be terminated at any time. However, where another instrument or agreement specifies a fixed term, the appointee may be entitled to compensation for the term remaining after the termination, subject only to the appointee's duty to mitigate.

In 1994, the British Columbia Court of Appeal found no inconsistency between a statutory provision that an appointment was at pleasure and a provision in an appointing instrument that set a specific date for the expiry of the term of office.[31] In considering how the two potentially contradictory provisions could be made to work together, the court decided that the appointment could be terminated at any time during its term because the appointment was at pleasure. However, the appointee was entitled to compensation for the full term, including the remainder of the term after the date of termination, because the term of office was specified in the appointing instrument.

More recently, the Supreme Court of Canada determined that a person appointed to a provincial board during good behaviour for a fixed term was entitled to compensation for the balance of the term – even though the board was restructured and the position was eliminated before the end of the term. The appointee had a duty to mitigate but was otherwise entitled, under the ordinary

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31 *Preston* v. *British Columbia* (1994), 92 B.C.L.R. (2d) 298 (B.C.C.A).

principles of contract law, to compensation and benefits pursuant to the appointment agreement with the board.[32] In effect, the repeal of the legislation and the premature revocation of the appointment were characterized as breaches of contract, thus entitling the appointee to damages.

Process for Terminating Appointments

Canadian courts have set down basic procedures governments should follow when terminating Order in Council appointments. In a 1990 decision, the Supreme Court of Canada ruled that administrative law principles may be invoked to impose basic fairness requirements on decisions to dismiss public office holders who serve at pleasure, even when these requirements are not stipulated in the relevant statute or employment contract.[33] In deciding to dismiss individuals appointed at pleasure to public office, the court found that decision makers must be cognizant of all relevant circumstances surrounding the employment and its termination. They must ensure that appointees understand the reasons for the termination and have an opportunity to respond and be heard.

Assessing the Framework for Termination and Severance

Arbitrary terminations can have chilling effects, particularly in the administrative justice community where the objective is to provide fair and certain results. Arbitrary terminations can also give rise to litigation alleging unlawful interference with the independent role of administrative tribunals. In recent years, through court decisions and the interrelated activities of government, emphasis has begun to shift from appointments at pleasure to a hybrid range of appointments, often with characteristics similar to or reflecting more conventional employment relationships. It is timely to crystallize government policy and practice so that host ministers, administrative tribunals, appointees and members of the public know – with a high degree of certainty – how, under what circumstances and at what cost appointments to administrative tribunals can be terminated before terms expire. The key components of a termination framework include:

- criteria for determining who should have the power of termination in individual circumstances;
- criteria for assessing and applying appropriate grounds for termination in individual circumstances;
- guidelines for implementing a fair, respectful and reasonable process for making and implementing termination decisions.

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32 *Wells* v. *Newfoundland* (1999), 46 C.C.E.L. (2d) 165 (S.C.C.).

33 See *Knight* v. *Indian Head School Division 19*, [1990] 1 S.C.R. 653.

The key components of a framework for severance include:

- guidelines on appropriate notice periods or severance in lieu of notice;
- guidelines on the range and amount of severance that is fair, reasonable, consistent and affordable.

Assessing Appointment Terms and Conditions

A comprehensive framework for appointments should address preliminary questions about who makes the appointment and for how long. It should also address whether appointees can be reappointed and what should happen when an appointment comes to an end. In this respect, an effective framework for administrative tribunal appointments should further the following strategic goals and address the following questions:

Competency

- Will the terms and conditions of appointment attract a sufficient pool of qualified candidates from which the most competent candidates can be selected?
- Will the terms and conditions of appointment provide the right incentives and protections to qualified candidates so that they can leave and potentially return to other employment on an appropriate basis?

Transparency

- Have the terms and conditions of appointment been established objectively?
- Would it be clear to an interested member of the public how the terms and conditions of appointment are to be applied with respect to particular tribunals and appointments?

Fairness

- Is there any evidence of unfairness or bias in the way in which the terms and conditions of appointment have been set out?
- Do the terms and conditions of appointment establish a common set of expectations and obligations that can be applied evenly and fairly across the administrative justice system?

Flexibility

- Do the terms and conditions of appointment accommodate the diverse needs of individual tribunals thus allowing for principled choices within an appropriate range of options?

Affordability/Efficiency

- Do the terms and conditions of appointment contribute to the overall effectiveness and efficiency of the appointment process by minimizing the length, expense and complexity of appointment negotiations?
- Does the tribunal have the resources to meet its obligations to appointees?

Recommendations for Appointment Terms and Conditions

In order to implement polices and procedures that will further government's strategic goals, it is recommended that the following guidelines for appointments to administrative tribunals be adopted. While there should be a general commitment to the principle of consistency, there should also be sufficient flexibility in practice to allow individual tribunals to adjust or adapt to particular or unusual circumstances. Accordingly, government should:

- **discontinue the practice of making tribunal appointments at pleasure or for the term of an appointee's working life and instead establish fixed term appointments within a range of 3 to 5 years with appropriate provisions for tenure, reappointment, termination and severance;**
- **in appropriate circumstances, permit initial appointments for terms of less than 2 years for the purpose of early performance reviews and assessments;**
- **remove current policy restrictions on the number of subsequent appointments an appointee may expect or accept;**
- **provide capacity to appoint tribunal members on a short-term acting or interim basis for the purpose of maintaining tribunal operations through transitional periods or for accommodating leaves of absence;**
- **establish consistent practices for providing notice to appointees of decisions not to reappoint or to terminate;**
- **clarify in legislation that tribunal members have the capacity to complete deliberations in proceedings that continue after they have resigned or their appointments have lapsed;**
- **initiate a review of current practices with respect to the appointment of staff to administrative tribunals and develop recommendations for further clarification and reform.**

In order to enhance the overall effectiveness of tribunal operations, it is recommended that government provide tribunal chairs with the capacity to delegate responsibilities and duties to other tribunal members.

COMPENSATION AND BENEFITS

No comprehensive framework exists for setting and reviewing compensation levels for appointees to administrative tribunals. Compensation for part time appointees is determined under Treasury Board directives that have been in place since 1990. Compensation for full time appointees is usually negotiated under the general provisions of tribunals' enabling legislation.

Salary ranges for positions in the provincial public sector and for the province's judges are a matter of public record. Within the public service generally, comparable positions are ranked and placed within a grid. Compensation in individual cases is then set within the range for each position and any required negotiations take place within the limits of that range. In each of the

province's courts, compensation for individual judges, other than for senior administrative judges or justices, is the same. This kind of transparency does not exist for appointees to administrative tribunals although, with considerable effort, information on salaries for individual appointees can be obtained.

In the absence of a comprehensive, transparent compensation framework, no formal requirement for public accountability has been established. As a consequence, wide variation in compensation practices has developed. In addition, there is evidence to suggest that, in some cases, separate agreements between the parties have been used to clarify or supplement compensation and benefits available under the limited directives that now exist.

Compensation for Full Time Appointees

In some ministries and for some tribunals, compensation for full time appointees is tied, either formally or informally, to a benchmark – a comparable position within the system of classification for other public sector employees. Benchmarking has the advantage of providing some degree of objectivity and transparency. However, by virtue of the specialized nature of an adjudicator's role and mandate, there are inherent difficulties in making valid or reliable comparisons between adjudicative positions and senior positions in the public sector.

As a matter of practice, benchmarking has not been used on a consistent basis across the administrative justice system.[34] In order to reflect prevailing market conditions, compensation packages have been negotiated outside the few public sector guidelines that exist in situations where the competencies required are highly specialized or in limited supply. Furthermore, where benchmarking is used, compensation has often been tied to the level in place on the date an appointment was made so that subsequent adjustments to compensation can only be made by amending an appointing order. This process is particularly cumbersome where an appointment is made by Order in Council.

[34] The federal government has developed a separate classification system for adjudicators that is distinct from the general public service classification system.

Compensation for Part Time Appointees

Part time adjudicators are paid the daily or per diem rates set by Treasury Board.[35] These rates apply to all provincial agencies, boards and commission and provide what is characterized as an honorarium for an appointee's contribution to public service.

The following rates were set for adjudicators in 1990 and remain in effect:

Position	Per Diem Rate
Chair	350
Vice-Chair	300
Member	250

The work of administrative tribunals is distinct from the more community-service oriented activities of many other provincial agencies, boards and commission. Although these distinctions are reflected in the rates paid to part time tribunal members, current compensation rates are low and bear scant relationship to the qualifications and skills that adjudicators must bring to the work they do. As such these rates may not be fully effective in attracting the widest array of highly skilled individuals.

Many part time adjudicators also maintain active professional practices in related fields like law, labour relations or medicine. To offset low per diem rates, some tribunals have entered into retainer agreements with part time members where the annual volume of cases can be predicted with some certainty. The effect of such agreements is to guarantee the tribunal a larger and more reliable pool of part time adjudicators and to provide greater certainty for individual members with respect to the time commitment and income they can expect as a result of their adjudicative responsibilities.

[35] See Order in Council 806/89. Treasury Board Directive 1/00 states that per diem rates are not intended to compensate for lost income from regular employment and that only one full per diem can be paid to an appointee in each 24-hour period.

Benefits

Benefits like pensions, health care coverage and leave are normally part of any compensation package. For individuals appointed to tribunals, the benefits in their compensation package may be:

- determined at the discretion of the appointing authority under the authority of the administrative tribunal's enabling legislation;
- set out expressly in the administrative tribunal's enabling legislation by reference to other enactments like the *Public Service Benefit Plan Act*;
- where the legislation is silent, determined at the discretion of the Lieutenant Governor in Council or the host minister under section 22 of the *Interpretation Act*.

Given the breadth of this discretion, and as noted with respect to compensation generally, there are wide variations in practice regarding benefits across the administrative justice system.

Establishing a Compensation Framework

A more comprehensive and consistent framework is needed to determine compensation and benefits for appointees to administrative tribunals. This would enhance the overall transparency and accountability of the administrative justice system. The principal objectives of a more comprehensive and consistent approach are to:

- provide a framework that is contemporary and affordable, thus allowing administrative tribunals to attract and retain the qualified individuals they need to fulfill their mandates effectively;
- provide adequate flexibility and discretion within the overall framework so that appointing authorities can address in a timely and realistic way prevailing market conditions and circumstances;
- ensure that the expenditure of public funds is managed effectively within limits that are known and reasonable;
- result in a compensation framework that is fair, understandable, transparent and can be held to full account by the public.

To achieve these objectives, a comprehensive and consistent framework for compensation and benefits should include:

- a system of classification for administrative tribunals that accurately reflects both the complexity of functions that each tribunal performs and the scope and dimensions of the respective responsibilities of chairs and members, whether full time or part time;
- a range of fees for each class of administrative tribunal, for chairs and members and for full time and part time appointees;

- guidelines for administrative tribunals and host ministries in negotiating individual agreements with prospective members and chairs;
- a process for monitoring compliance, approving exceptions and ensuring that the overall compensation framework remains current, relevant and effective.

In establishing appropriate fees and ranges, the following considerations should be taken into account:

- full time or part time nature of the appointment;
- complexity of the functions and expertise required;
- nature of the decision making and the degree of independence required or expected;
- length of time needed to learn the job;
- prevailing market conditions and environmental considerations;
- recruitment and retention issues;
- opportunity costs for appointees in accepting appointments;
- anticipated transition issues and costs associated with post-appointment employment.

Across the public sector, it is common practice to review compensation issues on a periodic basis. A similar practice should apply, in a predictable way, to administrative tribunals. This is not to suggest that a separate compensation council or administrative process should be put in place. In fact, given the relative size of the province's administrative justice system, the number of other mechanisms already in place for reviewing compensation across the public sector – and the limited time and capacity of both government and the administrative justice community to engage in compensation reviews and negotiations – it will likely be more effective and efficient if compensation reviews are linked to one of the processes already in place. In this respect, compensation adjustments could be tied to changes in widely accepted indices or to changes in compensation for selected public sector managers or provincial court judges. Whatever mechanisms are chosen, the approved process should be clearly defined and well understood by host ministers, administrative tribunals, appointees and the public.

Assessing the Compensation Framework

Any proposed changes to the existing framework for establishing and reviewing compensation and benefits for appointees to administrative tribunals should meet the following strategic objectives and address the following questions:

Competency

- Will the proposed framework for compensation and benefits attract a sufficient pool of qualified candidates from which the most competent can be selected?

Transparency

- Have compensation rates, ranges and review processes been defined and established objectively?
- Would it be clear to an interested member of the public how the compensation framework is to be applied with respect to particular tribunals and appointees?

Fairness

- Is there any evidence of unfairness or bias in the way in which the framework for compensation has been set out?
- Does the compensation framework establish a common set of expectations that can be applied evenly and fairly across the administrative system with the result that appointees in similar or comparable positions are treated in the same way?

Flexibility

- Does the compensation framework accommodate the diverse needs of individual tribunals thus allowing for principled choices within an appropriate range of options?

Affordability/Efficiency

- Does the compensation framework contribute to the overall effectiveness and efficiency of the administrative justice system by minimizing the time, expense and complexity of compensation negotiations?
- Are the compensation ranges and per diems reasonable and affordable in the current fiscal climate?

Recommendations for Compensation and Benefits

It is recommended that government review and implement changes to compensation and benefits for tribunal chairs and members in two stages:

- **first, to reflect changes in overall compensation levels since 1990;**
- **second, to define appropriate benchmarks and provide more consistency in and accountability for compensation levels across tribunals.**

INSTITUTIONAL CONSIDERATIONS AND OPTIONS

Earlier parts of this report addressed the substantive components of a comprehensive appointment policy, including recruitment and selection, term and tenure, termination and severance and compensation and benefits. Following is an examination of how appointment policies can be given operational effect through a more precise delineation of roles and responsibilities. The institutional considerations addressed include:

- the respective roles of government and tribunal chairs in the appointment process;
- the organizational options for managing the appointment process;

- the policy instruments that may be used as the basis for agreements between government, tribunals and appointees.

Shared Responsibilities for Recruitment and Selection

In its Public Agency Appointment Guidelines, the Board Resourcing and Development Office has established general rules for agencies and officials involved in making public appointments. The guidelines set out the respective responsibilities of the various parties in the following way:

- **Board Resourcing Development Office**: Sets the appointment guidelines, works with agencies and ministries to develop skills and experience profiles for vacancies, seeks out and screens potential candidates, recommends qualified candidates for appointment and generally oversees and monitors appointments to agencies.
- **Responsible Minister:** Appoints (in the case of Minister's Order) or recommends an appointment (in the case of appointments by Order in Council).
- **Ministry Officials:** Assist or manage the appointment process for the agencies within its domain.
- **Agency:** Prepares the skills and experience profile, recommends candidates to fill vacancies and assists in the recommendation process where appropriate.
- **Candidate:** Provides personal information and acknowledges, by formal signature, duties owed to the agency.

While this statement of roles and responsibilities can be applied generally to the appointment process for administrative tribunals, the role of the chair should be more fully, clearly and separately defined. Government and the tribunal chair should have a common understanding about the chair's role and this issue should be addressed in the appointment agreement from the outset of the chair's term of office.

For tribunal members, professional qualifications and reputation are critically important and should outweigh more general considerations based on diversity, community contribution, social values and affiliations. It is frequently the chair, rather than the minister or a government official, who is most likely to have appropriate ties to a tribunal's professional community. As such, the chair may be able to seek out and obtain confidential and frank assessments of a candidate's professional contribution, reputation and esteem.

Government's overarching principles of openness, transparency and accountability must be applied to the appointment process for tribunal members and to a redefined role for the tribunal chair in that process. At the end of the day, it must be clear to an interested member of the public how candidates for appointment are recruited and selected. In this regard, the following

additional responsibility for tribunal chairs should be added to the list in the Public Agency Appointment Guidelines:

- **Tribunal Chair:** Makes recommendations to government on all candidates whose names are being considered for appointment to the chair's administrative tribunal.

Selecting and Appointing Tribunal Chairs

The tribunal chair serves as a link between the policy objectives of government and the host minister, on the one hand, and the adjudicative decisions and processes of the tribunal, on the other. It is essential that government have confidence in the chair and that the chair be held to public account for the tribunal's overall performance and effectiveness. These considerations weigh strongly in favour of Order in Council appointments for tribunal chairs, with a coordinating role for the Board Resourcing and Development Office.

Selecting and Appointing Tribunal Members

Government has formal responsibility and final accountability for the performance of administrative tribunals. The chair's role in appointing members is not generally well-defined, either in legislation or as a matter of practice. In some circumstances, chairs participate with government in the recruitment and selection of other tribunal members. In other instances, tribunal members may be appointed by Cabinet or the host minister, with little or no involvement of the chair. As a matter of current practice, tribunal members are appointed in one of the following ways by:

- the Lieutenant Governor in Council (Cabinet);
- the host minister;
- the host minister after consultation with the chair;
- the chair with the approval of the host minister;
- the chair directly.

The choice of process is essentially a matter of policy and emphasis. A legislated role for the chair is more rigid and difficult to modify should circumstances change. On the other hand, an approach based on best practices offers the greatest degree of flexibility but can give rise potentially to inconsistencies and uncertainties. Within this framework, a tribunal chair may be expected to do one or more of the following:

- ensure that appropriate selection criteria are in place for upcoming appointments;
- provide advice to government on a list of potential appointees identified through a variety of sources including the chair;

- carry out due diligence for government on a list of potential appointees identified through a variety of sources including the chair;
- conduct a formal recruitment and selection process, providing a list of qualified appointees to government for final selection and appointment;
- conduct a formal recruitment and selection process, providing names of appointees to government for appointment;
- conduct a formal recruitment and selection process, making appointments directly after consultation or with the approval of the host minister;
- conduct a formal recruitment and selection process, making appointments directly.

Variations in the role of the chair are inevitable across the system. These variations reflect the nature of the tribunal, the characteristics of the environment within which it operates and whether the chair is full time or part time. However, the chair's role in the appointment process should be in harmony with the chair's other tribunal responsibilities. Particularly in cases where tribunal chairs have full time executive management responsibilities for the tribunal's fiscal and operational performance, accountability is undermined if chairs have little or no opportunity to participate in appointing tribunal members.

Appointment Models

Experience across common law jurisdictions has given rise to a range of options for structuring the administrative tribunal appointment process. The central issue for policy makers lies in choosing the model that best reflects prevailing values about the appropriate and necessary balance between public accountability and independent decision making. As noted earlier in this report, the accountability of the executive branch of government is strengthened where Cabinet and host ministers play a strong role in the appointment process while the independence of tribunals is enhanced where tribunals themselves or tribunal chairs play a pivotal role in the appointment process. At the same time, a strong role for the tribunal chair in the appointment process can be an effective technique for strengthening the tribunal's overall accountability to government. Across the continuum of accountability and independence, the following appointment models have been identified:

Model 1 – Responsibility Centralized in an Agency in the Premier's Office

Model 2 – Responsibility Vested in Host Ministries

Model 3 – Responsibility Centralized in a Public Sector Human Resource Agency

Model 4 – Responsibility Centralized in a Government Services Ministry

Model 5 – Responsibility for Member Appointments Vested in Administrative Tribunals

Model 6 – Responsibility Centralized in a Council of Administrative Tribunals

These models are not mutually exclusive. In choosing a system that best reflects the core values and principles of government and addresses the needs of administrative tribunals, aspects or components of one model may be combined with features of another. What the models are intended to highlight here is the range of choices and perspectives that should be taken into account in designing an appropriate appointment system for administrative tribunals in British Columbia.

In the following discussion, it is the roles of the various public agencies and officials that provide the focus. The types of instrument which are ultimately chosen to give effect to the appointment or to set its terms and conditions are discussed in the next part of this report.

Model 1 – Responsibility Centralized in an Agency in the Premier's Office

In circumstances where a public body's success is measured by how well it interprets or gives effect to the policy goals and values of government, opportunities for success will be enhanced if a centralized agency in the Premier's office plays a pivotal role in the appointment process. Such an agency is in an ideal position to develop a direct understanding of government's goals and values and to take these into account in the recruitment and selection process.

In a recent review of administrative practices and procedures in the United Kingdom, Sir Andrew Leggatt discussed the implications of centralizing overall responsibility for administrative tribunals in the Prime Minister's office. In Leggatt's view, while this move would undoubtedly elevate the importance and profile of the tribunal system, it could also undermine the system's independence by linking it very directly to the delivery of government policies.[36] Additionally, Leggatt observed that the establishment of a centralized office for tribunal administration would add a significant workload to the Prime Minister's office – a workload without comparable functions in that office in the United Kingdom.

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[36] Sir Andrew Leggatt. "Tribunals for Users: One System, One Service", Report of the Review of Tribunals, March 2001, p. 2.23.

A centralized agency in the Premier's office with primary responsibility for tribunal appointments would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to implement more consistent policies and practices across the administrative justice system;
- opportunities to achieve administrative efficiencies through the centralized pooling and assessment of candidates suitable for a variety of vacancies;
- potentially stronger role for tribunal chairs in providing expert advice and recommendations on appointments to a centralized agency;
- better separation (and hence greater independence) between ongoing government operations and tribunals, particularly where government decisions are subject to tribunal review.

Possible Disadvantages:

- potential loss of policy expertise and the contextual knowledge that host ministries bring or apply to the appointment process;
- potential weakening of the relationship between tribunal chairs and host ministers with a resultant loss in overall accountability.

British Columbia has implemented a modified version of this model for managing appointments to its Crown corporations and agencies.[37] Under this model, the Board Resourcing and Development Office has the lead role in the recruitment and selection process, advising the Premier on recommendations for Order in Council appointments. In practice, the Board Resourcing and Development Office works closely with government officials and agency chairs to identify candidates, assess their qualifications and make appointment recommendations to Cabinet. In this respect, the model balances public accountability for the appointment process with the policy expertise and detailed contextual knowledge of government and its officials and agencies.

Model 2 – Responsibility Vested in Host Ministries

Administrative tribunals have been established over the course of many years for a diverse variety of purposes. In some instances, tribunals, like the Employment Standards Tribunal, are mandated to review decisions of officials in their host ministries. In other instances, tribunals and host ministries have similar mandates. For example, the Labour Relations Board and the Ministry of Skills Development and Labour share a commonality of mandate over issues that arise in the

[37] For further information see, Office of the Premier. "Service Plan 2002/2003 – 2004/2005", February, 2000; Public Agency Appointment Guidelines and "Crown Corporations Board of Directors Appointment Guidelines".

workplace. There are also instances where a tribunal's relationship with its host ministry is based on more informal considerations. For example, the choice of the Ministry of Attorney General as the host ministry for the Expropriation Compensation Board is more likely a reflection of the particular interests and concerns of the host minister than an expression of a shared or common mandate between the ministry and the tribunal.

Prior to the establishment of the Board Resourcing and Development Office and its predecessor (the Appointment Office for Agencies, Boards and Commissions), host ministries and administrative tribunals developed a diverse array of arrangements for managing the appointment process. Factors that influenced these arrangements included:

- the number and size of administrative tribunals within the host minister's portfolio;
- the history of the relationship between the host ministry and the tribunal;
- the unique needs and circumstances of the tribunal;
- the scope and range of other services the host ministry provides.

In the simplest cases and with varying degrees of assistance from officials in host ministries, tribunal chairs would identify potential candidates and forward a name or a list of candidates to the deputy minister for approval by the host minister or Cabinet. In more complex cases, the tribunal chair, the host ministry or the Premier's office might carry out a full-blown and very public recruitment and selection process, in some instances with the assistance of executive recruiting firms. The ad hoc nature of the process afforded great flexibility but little certainty, transparency or public accountability.

From this perspective, a decentralized process for appointments with primary responsibilities vested in host ministries would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to maintain a flexible approach that is responsive to the unique needs and circumstances of individual tribunals, thus ensuring a good "fit" between candidates and individual tribunals;
- opportunities to effect cost savings and efficiencies by simplifying the process and reducing the number of required approvals;
- opportunities to improve the timeliness of decision making;
- opportunities to strengthen the working relationship between tribunal chairs and host ministers;
- opportunities to draw on policy expertise and contextual knowledge of host ministries.

Possible Disadvantages:

- potential loss of public confidence in the openness and transparency of the appointment process;
- perceived interference with the impartiality and independence of a tribunal, particularly where ministry decisions are subject to tribunal review;
- less consistency in approach and greater variation across the administrative justice system.

Experience has shown that, where host ministries deal with appointments for one or two small tribunals, the appointment process is very often ad hoc, flexible and responsive to immediate needs. However, if host ministries actively manage appointments for several large tribunals or for a large number of smaller ones, administrative systems are usually in place to:

- manage the appointment process and keep track of upcoming vacancies;
- provide current information on the nature of the organization and the types of appointments required;
- provide advice to others on the skills and qualifications required for the appointment;
- provide information or recommendations on issues of reappointment;
- make recommendations on proposed terms and conditions of appointment;
- meet any other legislative or Cabinet requirements associated with the appointment.

With the announcement of an expanded mandate for the Board Resourcing and Development Office, the province has begun to move away from a ministerial model for tribunal appointments. Where previously the host minister or tribunal chair would have taken the lead in identifying and screening potential candidates, the process now involves several parties and requires considerable coordination and management attention to administer. In this context, the benefits of improved central coordination need to be balanced against the potential disadvantages of duplication and overlap where ministerial programs and services already exist.

Diversity in practice can be beneficial and constructive. For host ministries that, for a variety of reasons, have not developed effective internal administrative systems and practices, a strong role for a centralized appointments office is likely to enhance the quality and timeliness of appointments. However, for host ministries that have been extensively involved in the appointments process and have already developed close working relationships with tribunal chairs, some adjustments in the currently defined roles and responsibilities of both the Board Resourcing and Development Office and the host ministries would assist in streamlining current processes and in improving overall effectiveness. Within the context of a model that balances the

political accountability of a centralized process with the substantive expertise of host ministries, potential areas for improvement and clarification include:

- a strong and ongoing role for the central agencies of government in the selection and appointment of tribunal chairs;
- a strong and ongoing role for host ministers and tribunal chairs in the selection and appointment of tribunal members;
- where host ministries have not developed effective internal systems, a strong role for the central agencies of government in the appointment process;
- where host ministries have developed effective internal systems, a role for the central agencies of government in the appointment process more akin to an audit function.

Model 3 – Responsibility Centralized in a Public Sector Human Resource Agency

Most governments in common law jurisdictions have established centralized agencies, policies and practices for human resource management across the public sector. Under a so-called civil service model of recruitment and selection, standardized, commonly accepted and objective processes are put in place for find and choose the most qualified candidates for appointment to administrative positions within the executive branch of government. The underlying goal of the civil service model is to ensure that public service appointments are based on merit and not influenced by political considerations. In contrast to models where the value of political accountability is high, the civil service model emphasizes neutrality by sheltering appointments from the political processes of the day.

In British Columbia, the Public Service Employee Relations Commission manages recruitment and selection for most civil servants within the provincial public sector. Significantly, senior government executives (deputy and assistant deputy ministers) may be recruited outside this process. While government directives on many issues like compensation and benefits apply to these senior officials, it has become common practice for government ministers to be much more involved in selecting the senior officials with whom they will work most closely. The minister's role in this respect clearly acknowledges that personal trust and confidence lie at the core of working relationships with senior officials.

It may be desirable to foster a similar relationship of trust and confidence between host ministers and tribunal chairs. In these circumstances, a more neutral civil service model of recruitment and selection would not likely be suitable for appointing tribunal chairs. However, responsibility for the recruitment and selection of other tribunal members could be tied more closely to a neutral process like that of the Public Services Employee Relations Commission. The integration of this

responsibility with a neutral public service approach to recruitment and selection would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to implement more consistent policies and practices across the administrative justice system and to establish a more neutral and transparent process for recruitment and selection;
- opportunities to achieve administrative efficiencies through the centralized pooling and assessment of candidates suitable for a variety of vacancies;
- potentially stronger role for tribunal chairs in providing expert advice and recommendations on appointments;
- better separation (and hence greater independence) between ongoing government operations and tribunals, particularly where government decisions are subject to tribunal review.

Possible Disadvantages:

- potential loss of policy expertise and the contextual knowledge that host ministries bring or apply to the appointment process;
- potential weakening of the relationship between tribunal chairs and host ministers with a resultant loss in overall accountability;
- potential increases in costs associated with the involvement of another public agency in the appointment process and with the application of long-term hiring practices to term appointments;
- potential loss of flexibility in adapting the appointment process to meet particular needs and circumstances and ensuring the best "fit" between candidates and individual tribunals.

Model 4 – Responsibility Centralized in a Government Services Ministry

A variation on the neutral civil service model can be achieved by centralizing responsibility for all administrative tribunal matters, including appointments, in a single government services ministry. This model is currently being considered in the United Kingdom by the Lord Chancellor's office in response to the Leggatt report.

Appointments constitute only one dimension of the ongoing administrative relationship between government and tribunals. At present in British Columbia, 17 host ministries are involved to a greater or lesser extent in providing services and supports to administrative tribunals. These services and supports range from appointments through administrative services to financial planning and budgeting. In this respect, host ministers may:

- make recommendations to Cabinet with respect to the establishment, consolidation or elimination of agencies;

- consult with tribunal chairs and others on significant new directions or changes to a tribunal's enabling legislation;
- advise tribunal chairs of government's priorities and broad policy directions;
- report and respond to Cabinet and the legislature on a tribunal's performance and its compliance with the government's broad policy directions and operational policies;
- receive and table a tribunal's annual report in the legislature;
- obtain funding for a tribunal through the government's budgetary processes.

While some tribunals have very little in common with the substantive mandates of their host ministries, there are clearly strong linkages for others. Maintaining an appropriately balanced and arm's length relationship is always a challenge, particularly when a tribunal is mandated to review the decisions of its host ministry. The 1990 Ratushny report for the Canadian Bar Association expressed its support for a more consolidated approach to tribunal appointments in the following way:

> *....There is another reason for concentrating these appointments under one Minister. The numbers involved would justify having in place staff who are dedicated to the task of seeking out well-qualified persons and gathering information about names that are received from other sources. In other words, the task of making appointments could be organized on a systematic, comprehensive and ongoing basis.*[38]

Viewed from a systemic perspective, government's overall responsibilities for administrative tribunals, including its role in tribunal appointments, could be further consolidated by transferring primary responsibilities to:

- a government services ministry like the Ministry of Management Services;
- the Ministry of Attorney General, as part of the ministry's overall mandate and responsibility for the province's justice system;
- a few key ministries with policy responsibilities in broad social or economic areas.

A more centralized model would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to implement consistent policies and practices across the administrative justice system and to focus resources on issues of a systemic or common nature;
- opportunities to achieve administrative efficiencies through the centralized pooling and assessment of candidates suitable for a variety of vacancies;
- better separation (and hence greater independence) between ongoing government operations and tribunals, particularly where ministry decisions are subject to tribunal review.

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[38] Ratushny, supra., p. 82.

Possible Disadvantages:

- potential loss of policy expertise and the contextual knowledge that host ministries bring or apply to the appointment process;
- potential loss of flexibility in adapting the appointment process to meet particular needs and circumstances and in ensuring the best "fit" between candidates and individual tribunals.

Model 5 – Responsibility for Member Appointments Vested in Administrative Tribunals

Where government places a high value on accountability for delivering programs and services, the chair of an administrative tribunal can be held to account most effectively if the chair has a significant role in the recruitment and selection of the tribunal's members. As a matter of sound management practice, if chairs are to be held to account for the operations and effectiveness of their tribunals, they must have a strong, but not necessarily deciding, voice in the appointment process.

For most of British Columbia's administrative tribunals, members are currently appointed either by Order in Council or by the host minister. The two notable exceptions are the Employment Standards Tribunal and the Appeal Division of the Workers' Compensation Board. For these tribunals, the chair has responsibility for appointments and is accountable for all aspects of human resource management including recruitment and selection, due diligence and performance management. However, in amendments tabled recently under the *Workers Compensation Amendment Act (No. 2), 2002*, the chair of the new appeal tribunal will be appointed by Order in Council while the other members of the tribunal will be appointed, following the transitional period, by the chair, after consultation with the host minister.

A decentralized model with primary responsibility for member appointments vested in tribunal chairs would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to maintain a flexible approach that is responsive to the unique needs and circumstances of individual tribunals, thus ensuring the best "fit" between candidates and individual tribunals;
- opportunities to reduce the workload of host ministries and the central agencies of government;
- opportunities to effect cost savings and efficiencies by simplifying the process and reducing the number of required approvals;
- opportunities to improve the timeliness of decision making;
- opportunities to draw on policy expertise and the contextual knowledge of host ministries.

Possible Disadvantages:

- loss of political accountability for appointment decisions;
- loss of public confidence in the openness and transparency of the appointment process;
- lack of consistency in approach and great variation across the administrative justice system.

Vesting primary responsibility for the appointment of members in tribunal chairs is consistent with best governance practices for Crown corporations.[39] However, in the context of administrative justice, direct appointments by the chair may raise issues about the independence and impartiality of tribunal members. To address these concerns, it may be desirable under this model and as a matter of practice, to limit the authority of the chair by:

- obliging chairs to consult with host ministers before appointments are finalized;
- establishing a formal framework for the periodic external review and audit of the appointment process itself.

Model 6 – Responsibility Centralized in a Council of Administrative Tribunals

Under this model, government would establish an independent arm's length council for administrative tribunals that would have broad responsibilities for tribunal appointments and other administrative justice issues. This model directly addresses tribunal appointments from the perspective of the administrative justice system as a whole and reinforces the values of impartiality and independence for all tribunal members. It is similar in structure to the model British Columbia has put in place for appointments to its provincial courts. Under this model, the council would have primary responsibility for recruitment and selection, due diligence and the subsequent investigation of complaints about appointees.

The province's judicial council is a council of this nature. It is appointed under the *Provincial Court Act* and chaired by the Chief Judge of the Provincial Court. The judicial council has eight representatives from the general public, the legal profession and the judiciary. Its mandate is to make recommendations to the Attorney General on appointments to the provincial court.

In the United Kingdom, Sir Andrew Leggatt recently recommended the establishment of a new independent Tribunals Board to advise the Lord Chancellor on tribunal appointments,

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[39] See, for example, the 2000 Report of the Auditor General of Canada at pp. 12-13. The report commented on three models for recruiting board members for federal Crown corporations. In circumstances where the Crown corporation's board played a significant role in recruitment and selection, the Auditor General observed strong support for subsequent accountability and performance.

qualifications and complaints.[40] Significantly, the Lord Chancellor's neutrality is also assured as the office's policy responsibilities are not reviewable by any administrative tribunals.

The British Columbia Council of Administrative Tribunals (BCCAT)[41] has recently recommended that government establish a similar administrative justice council to "coordinate activities and advise government and tribunals on issues relevant to the effective and efficient functioning of the administrative justice system".[42] As proposed by BCCAT, the administrative justice council would provide advice on appointment issues but would not necessarily play a formal role in the recruitment and selection process. Similar recommendations were made by administrative agency chairs to the Ontario Management Board Secretariat in 1992.[43]

An independent, arm's length council with primary responsibility for tribunal appointments would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to enhance public confidence in the independence and impartiality of administrative tribunals;
- opportunities to implement consistent policies and practices across the administrative justice system, to establish a neutral and transparent process for recruitment and selection and to focus resources on issues of a systemic or common nature;
- opportunities to achieve administrative efficiencies through the centralized pooling and assessment of candidates suitable for a variety of vacancies;
- potentially stronger role for tribunal chairs in providing expert advice and recommendations on appointments;
- clear separation between ongoing government operations and tribunals, particularly where government decisions are subject to tribunal review.

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40 Leggatt Report, supra, Recommendations 2.1 and 2.4.

41 The British Columbia Council of Administrative Tribunals (BCCAT) was established in 1996. Its mandate is to serve the public interest by contributing to the development and improvement of administrative justice in a non-partisan, independent and objective manner. BCCAT is an incorporated society created, governed and maintained by its members. With a membership of more than 200, BCCAT represents a broad cross-section of the administrative justice community including adjudicators, mediators, lawyers, regulators and government officials. BCCAT prepared a research report on appointment issues in 1997 and, most recently, has made a formal submission to the Attorney General on the work that is currently being undertaken by the Administrative Justice Project.

42 British Columbia Council of Administrative Tribunals: "Administrative Justice in British Columbia: Ensuring Fairness and Accountability", March 2002, p. 2.

43 D. MacDonald: "Ontario's Agencies, Boards and Commissions Come of Age", Canadian Public Administration, vol. 26, No. 3, pp. 349-363.

Possible Disadvantages:

- potential loss of political accountability for appointment decisions;
- potential loss of policy expertise and the contextual knowledge that host ministries bring or apply to the appointment process;
- potential increases in costs associated with the creation of a new public agency;
- potential loss of flexibility in adapting the appointment process to meet particular needs and circumstances and in ensuring the best "fit" between candidates and individual tribunals.

Assessing Appointment Models

As noted previously, the debate about appointment models centres on issues of public accountability and independence in decision making. Changes to the current appointment process have the potential to achieve economies of scale, realize efficiencies through shared services, improve timeliness and streamline approval processes. These improvements will ensure that:

- the model supports competency based recruitment and selection through a process that is open, fair and transparent;
- the roles and responsibilities of the parties involved in the appointment process are clearly defined and set out in legislation or in the policies and agreements that govern their relationships;
- the resulting processes are affordable, efficient and flexible enough to provide consistency yet accommodate the unique features and characteristics of each of the tribunals within the administrative justice system.

The assessment of appointment models must also take into account other dimensions of the ongoing relationships between host ministries and administrative tribunals. Some models would centralize appointment responsibilities in one agency, leaving administrative arrangements for other services such as finance, training and technology to host ministries. Other models would decentralize appointments, thus providing opportunities for closer integration between the appointment process and other inter-related administrative services provided to individual tribunals. In this respect, the discussion in this report raises questions about whether tribunals should remain with their current host ministries or whether they should derive their support and associated services from a central ministry (like the Ministry of Management Services), from the Attorney General as minister responsible for the overall administration of the provincial justice system or from an independent, arm's length council of administrative tribunals.

Recommendations for an Appointment Model

Consistent with government's overall commitment to ministerial accountability and the delegation of powers from central government, the appointment model proposed here represents a significant devolution of responsibility from Cabinet to host ministries and administrative tribunals. The model addresses the critical need of tribunal chairs for a larger and more clearly defined role in the appointment process. At the same time, the model is proportionate to the size and scope of the province's administrative justice system, builds on existing institutions and processes rather than creating new ones and reflects current fiscal conditions within the provincial public sector.

Under the proposed model, public accountability for the appointment of tribunal chairs rests clearly with Cabinet, while accountability for the appointment of tribunal members rests with host ministers and tribunal chairs. As such the recommendations are a hybrid based on selected features from Models 1, 2 and 4. This approach will enhance the independence of individual tribunals by giving chairs a clearly defined role in the appointment of tribunal members and enhance tribunals' accountability to government through the office of the chair.

It is recommended that the Board Resourcing and Development Office continue to take the lead in the recruitment and selection of tribunal chairs and that tribunal chairs, in consultation with the Board Resourcing and Development Office, take the lead in the recruitment and selection of tribunal members, subject to formal approval and appointment by Cabinet.

Subject to specific considerations within individual tribunals, it is recommended that government:

- **amend legislation, where necessary, to provide for the appointment of:**
  - **tribunal chairs by Order in Council;**
  - **tribunal members by Order in Council on the recommendation of tribunal chairs and after completion of a merit based recruitment process;**
- **reduce, from 17, the number of host ministries with responsibilities for administrative tribunals;**
- **provide centralized coordination and support to tribunal chairs in the development of appointment plans, recruitment strategies and processes.**

It is recommended that the Board Resourcing and Development Office have an ongoing supervisory role in standard setting and in monitoring and auditing the recruitment and selection practices of host ministries and tribunals.

Policy Instruments

A variety of policy instruments may be used, either alone or in combination, to give effect to appointment agreements. Taken as a whole, these agreements should cover terms of office, reporting and accountability, compensation and benefits, reappointments, termination, severance, standards of conduct and conflicts of interest. In individual circumstances, the range of instruments used to give effect to an appointment agreement might include:

- general legislation or regulations governing appointments and their terms and conditions;[44]
- specific legislation in a tribunal's enabling statue setting out the terms and conditions of an appointment;
- terms and conditions of an Order in Council or ministerial order;
- terms and conditions in a memorandum of understanding between a host ministry and an administrative tribunal;
- general policy guidelines of the appointing authority or host ministry;
- terms and conditions of an appointment agreement or contract between the appointing authority and an appointee.

No consistent practices for administrative tribunals are currently in place in British Columbia. For many appointees, neither the tribunal's enabling legislation nor the appointing order sets out clearly defined expectations and responsibilities.

For members of a few tribunals, enabling legislation confers express authority for entering into appointment agreements. Section 131(4) of the *Labour Relations Code* provides one example:

> ***Labour Relations Code*** (Labour Relations Board)
>
> 131(4) The minister, on behalf of the government may make a contract with the chair, vice chairs or other members of the board containing mutually agreed terms and conditions not inconsistent with this code.

In many other circumstances, appointing authorities and appointees have entered into separate and essentially private contractual arrangements to address obvious deficiencies and uncertainties in either the tribunal's legislation or the appointing order.

In an environment where government is committed to greater openness and public accountability, there is a pressing need to develop an appropriate framework with open and transparent guidelines for appointments to administrative tribunals.

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[44] See the *Public Service Act*, the *Public Sector Employers Act* and the general terms and conditions of Order in Council appointments set out in OIC 806/99.

Enabling Legislation, Regulations and Orders in Council

A systematic review of the formal framework for appointments should be undertaken as part of the recommended review of the enabling statutes for administrative tribunals. It should be clear that government, tribunal chairs and the tribunals themselves have the full range of powers they require to give effect to the appointment recommendations in this report.

Memorandum of Understanding

Governments frequently enter into memoranda of understanding to clarify the roles and responsibilities of departments and agencies whose mandates are contiguous or overlapping. These agreements are used to articulate mutual understandings and to establish operating relationships between government ministries, between ministries and other levels of government, or between ministries and arm's length agencies such as Crown corporations or administrative tribunals.

For a number of months prior to the initiation of the Administrative Justice Project, a joint working committee of government officials and members of the administrative justice community had been discussing and developing a draft Memorandum of Understanding (MOU) to formalize arrangements between host ministers, ministries and administrative tribunals.[45] For each of the intended parties to the agreement, the draft MOU set out basic roles, responsibilities, expectations and accountabilities. As such, the draft MOU provided an important framework within which tribunals and government could discuss not only appointment issues but also other issues of shared concern with respect to mandate, policy, planning, finances, staffing and administration.

On the issue of appointments, the draft MOU established the general principle that the minister is responsible for making appointments or recommendations about appointments to Cabinet in a timely way after appropriate consultation with the tribunal chair. The draft MOU stated that the chair's responsibilities in the appointment process should be to:

- provide, in a timely and appropriate way, input and recommendations about the appointment and reappointment of tribunal members;
- establish and monitor performance of tribunal members and staff.

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[45] Ministry of Attorney General. Model Memorandum of Understanding: A Guide For Ministries of the Provincial Government and Associated Agencies, Boards and Commissions. For Discussion, July 2000.

The Circle of Chairs[46] raised a number of concerns about the draft MOU and its implementation in correspondence with government in October 2000. Given the very different history and circumstances of individual tribunals, the Circle emphasized ongoing requirements for:

- flexibility in adapting the terms of the MOU through specific agreements between individual host ministries and tribunals;
- adequate resources to support effective implementation of the MOU;
- enhancements to the role of the tribunal chair in monitoring and being held accountable for the performance of the tribunal and its members.

To date, these issues have not been fully addressed. Implementation of the draft MOU was deferred following the initiation of the Administrative Justice Project in July 2001. As a consequence, the issues that will be addressed in implementing the Project's appointment recommendations will include not only the draft MOU but also the as-yet-unresolved concerns of the Circle of Chairs.

Appointment Agreements

An appointment agreement is the key component of an effective appointment policy. It is a specific document that sets out, within the framework of a tribunal's enabling legislation, the precise obligations and expectations of appointing authorities and appointees. As Roderick MacDonald observed in comments to a BCCAT conference in 1998:

> *...a touchstone to accountability is accountability to oneself: detailed mandate letters for OIC appointments, phrased in terms of aspiration and not in terms of minimum duties, can set the tone for fidelity to an ethic of personal responsibility, without which no agency can succeed.*[47]

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[46] The Circle of Chairs was established to provide a separate forum for the chairs of administrative tribunals to meet and discuss tribunal management issues. Membership in the Circle is restricted to chairs or to those who have management responsibilities for an independent agency, board or commission that is created by provincial legislation, performs an adjudicative function and maintains an arm's length relationship with government. It is not open to government employees who exercise similar functions within a line ministry of government.

In February 2002, the Circle presented a paper on "Appointments to Administrative Tribunals" to the Administrative Justice Project. The paper addresses issues of independence and accountability and provides commentary on various appointment models, the role of the chair in the appointment process and the need for a process that is open, transparent and merit based.

[47] Comments made by Roderick A. MacDonald "Measure for Measure – Audits and Accountability" to BCCAT conference November 1998.

In Ontario, the Management Board Secretariat has developed a draft appointment agreement that is similar in structure to a contract of employment. Discussions related to its implementation are ongoing. The agreement itself addresses or confirms mutual expectations about an appointee's:

- term of office;
- remuneration and benefits;
- standards of conduct, including the obligation to comply with the lawful direction of the chair;
- participation in orientation and training;
- indemnification;
- duty to disclose real or perceived conflicts of interest;
- duty to maintain confidentiality;
- duty to comply with policy and procedures;
- agreement to participate in performance evaluations;
- right to participate in a complaints procedure;
- options for renewal or reappointment;
- rights on reorganization;
- right to notice of non-renewal;
- revocation for cause;
- obligation to provide reasonable notice upon resignation.

Recommended Policy Instruments

It is recommended that government clarify the roles and responsibilities of the Board Resourcing and Development Office, host ministries and tribunals through an operating agreement, amending the agreement where necessary and appropriate to ensure that all partners in the appointment process are signatories to a formal agreement.

It is recommended that government:

- **develop and implement a standard form of appointment agreement for administrative tribunals setting out government's expectations with respect to term and tenure, reappointment, notice, termination and severance, compensation and benefits;**
- **if necessary, amend the *Public Sector Employers Act* to clarify how and to what extent that Act applies to administrative tribunals.**

CONCLUSION AND RECOMMENDATIONS

Questions about how appointments are made and who has a role in recruitment and selection are critical issues for government and for the tribunals that form the core of the province's system of administrative justice. In this respect, a modern and relevant approach to tribunal appointments requires a commitment to:

- the principle of merit as the basis for appointment decisions;
- the values of transparency, fairness, flexibility, affordability and efficiency.

In meeting these commitments, it is also essential to provide an appropriate balance between the independence of individual tribunal decision makers and the public accountability of administrative tribunals to the people they serve, bearing in mind that tribunals often represent the only point of contact many people have with the formal justice system.

As discussed in this report, an effective framework for tribunal appointments must address three key issues:

- the compelling need for government to provide greater certainty and consistency in policy and in the processes and standards that are followed and applied;
- the need for government to clarify its expectations of tribunal chairs with respect to both their specific obligations in the appointment process and their other duties as the heads of administrative tribunals;
- the expressed need within the administrative justice community for a central focus within the public sector to address the policy and legislative requirements of this vital part of the justice system.

Within British Columbia's current tribunal appointment system there are shortcomings, uncertainties, duplication and overlap. For some ministries and tribunals, current practices and processes also give rise to issues about timeliness and delay. Addressing these issues will be central to the achievement of an approach to tribunal appointments that encompasses:

- a planned and transparent process for recruitment and selection;
- a comprehensive and competitive set of terms and conditions of engagement – dealing not only with remuneration, but also with performance expectations, management reviews, benefits, severance and transition back to other work;
- a well-defined role for tribunal chairs, clearly articulating the respective operational responsibilities and accountabilities of both government and tribunals;
- a framework for government to organize itself, not only with respect to appointments, but also with respect to the other services it provides to administrative tribunals.

The recommendations that follow are intended to provide a more centralized focus for appointment issues. They build on government's recent initiatives with respect to public

appointments – such as the establishment of the Board Resourcing and Development Office – by addressing issues that arise specifically within the administrative justice system.

Recommendations

By making sound appointments to administrative tribunals, government can foster public confidence in the administrative justice system, enhance the transparency of the appointment process, ensure fair and open recruitment practices and provide for appointments that are based on merit. Implementation of the following recommendations will allow government to achieve these objectives.

Recommendations for Recruitment and Selection

In order to support the development of an orderly recruitment and selection process, it is recommended that an annual appointment plan be prepared for each administrative tribunal setting out in advance:

- **the respective roles and responsibilities of host ministries and tribunals;**
- **the number of vacancies anticipated in a given year including the number to be filled by recruitment efforts and renewals;**
- **the types of positions to be filled, whether chairs or members and whether full time or part time;**
- **the kinds of recruitment and outreach activities that will be required, including their potential costs;**
- **the critical timelines from initiation to completion for key deliverables and appointment decisions.**

Within the framework of an annual appointment plan, it is recommended that a needs assessment be prepared or updated each time tribunal appointments are required.

It is recommended that tribunals have the capacity to make a variety of appointments tailored to meet their individual needs and circumstances. Where appropriate, it should be possible to make appointments on a full time, part time or contractual basis. Further, cross-appointments should be encouraged where the required adjudicative expertise is transferable and it would not be contrary to the public interest to do so.

It is recommended that job descriptions be developed for administrative tribunal appointees.

It is recommended that recruitment and selection be based on open, transparent and competitive processes that are proportionate to the nature of the position being filled and subject to monitoring and auditing by the Board Resourcing and Development Office.

Recommendations for Appointment Terms and Conditions

In order to implement polices and procedures that will further government's strategic goals, it is recommended that the following guidelines for appointments to administrative tribunals be adopted. While there should be a general commitment to the principle of consistency, there should also be sufficient flexibility in practice to allow individual tribunals to adjust or adapt to particular or unusual circumstances. Accordingly, government should:

- discontinue the practice of making tribunal appointments at pleasure or for the term of an appointee's working life and instead establish fixed term appointments within a range of 3 to 5 years with appropriate provisions for tenure, reappointment, termination and severance;
- in appropriate circumstances, permit initial appointments for terms of less than 2 years for the purpose of early performance reviews and assessments;
- remove current policy restrictions on the number of subsequent appointments an appointee may expect or accept;
- provide capacity to appoint tribunal members on a short-term acting or interim basis for the purpose of maintaining tribunal operations through transitional periods or for accommodating leaves of absence;
- establish consistent practices for providing notice to appointees of decisions not to reappoint or to terminate;
- clarify in legislation that tribunal members have the capacity to complete deliberations in proceedings that continue after they have resigned or their appointments have lapsed;
- initiate a review of current legislation and practices with respect to the appointment of staff to administrative tribunals and develop recommendations for further clarification and reform.

In order to enhance the overall effectiveness of tribunal operations, it is recommended that government provide tribunal chairs with the capacity to delegate responsibilities and duties to other tribunal members.

Recommendations for Compensation and Benefits

It is recommended that government review and implement changes to compensation and benefits for tribunal chairs and members in two stages:

- first, to reflect changes in overall compensation levels since 1990;
- second, to define appropriate benchmarks and provide more consistency in and accountability for compensation levels across tribunals.

Recommendations for an Appointment Model

It is recommended that the Board Resourcing and Development Office continue to take the lead in the recruitment and selection of tribunal chairs and that tribunal chairs, in consultation with the Board Resourcing and Development Office, take the lead in the recruitment and selection of tribunal members, subject to formal approval and appointment by Cabinet.

Subject to specific considerations within individual tribunals, it is recommended that government:

- amend legislation, where necessary, to provide for the appointment of:
  - tribunal chairs by Order in Council;
  - tribunal members by Order in Council on the recommendation of tribunal chairs and after completion of a merit based recruitment process;
- reduce, from 17, the number of host ministries with responsibilities for administrative tribunals;
- provide centralized coordination and support to tribunal chairs in the development of appointment plans, recruitment strategies and processes.

It is recommended that the Board Resourcing and Development Office have an ongoing supervisory role in standard setting and in monitoring and auditing the recruitment and selection practices of host ministries and tribunals.

Recommended Policy Instruments

It is recommended that government clarify the roles and responsibilities of the Board Resourcing and Development Office, host ministries and tribunals through an operating agreement, amending the agreement where necessary and appropriate to ensure that all partners in the appointment process are signatories to a formal agreement.

It is recommended that government:

- develop and implement a standard form of appointment agreement for administrative tribunals setting out government's expectations with respect to term and tenure, reappointment, notice, termination and severance, compensation and benefits;
- if necessary, amend the *Public Sector Employers Act* to clarify how and to what extent that Act applies to administrative tribunals.

PROVIDING ADMINISTRATIVE TRIBUNALS WITH ESSENTIAL POWERS AND PROCEDURES

Report and Recommendations

Prepared by

Administrative Justice Project

for the

Attorney General of British Columbia

July 2002

FOREWORD

The following report was prepared for British Columbia's Administrative Justice Project. Established in July 2001, the Project is part of the government's commitment to ensure that the administrative justice system is accessible, efficient, fair and affordable.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. It has also set forth a series of recommendations to address the most significant challenges facing the system today.

This report discusses the powers, procedures and functions of administrative tribunals, emphasizing the need to strike an appropriate balance between flexibility at the individual tribunal level and consistency across administrative tribunals. It recommends a principled, consistent approach to legislative decisions about what powers are appropriately granted to a tribunal and how such powers are described. The recommendations are aimed at ensuring both procedural fairness and effective tribunal administration.

The analysis and recommendations presented here support the Administrative Justice Project's White Paper. Copies of the White Paper, other background papers, reports and further information on the Project are available through the Internet at: www.gov.bc.ca/ajp.

Interested readers are invited to provide comments on the White Paper and related reports before November 15, 2002 by:

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Table of Contents

Introduction 2
Responses to the Background Paper 3
British Columbia Council of Administrative Tribunals 3
Law Society of British Columbia 5
Dispute Resolution Office, Justice Services Branch 6
West Coast Environmental Law Association 7
Office of the Ombudsman 8
British Columbia Labour Relations Board 9
Model Statutory Powers Policy Document 10
Differentiating between Powers and Procedures 16
Selected Examples and Some Issues 19
Power to Organize the Composition of the Board 19
Power to Admit Evidence 21
Open or *In Camera* Hearings 23
Other Issues Relating to Pre-Hearing Disclosure 23
Enforcement Powers 24
Power to Reconsider 25
Administrative Tribunal Protection or Immunity Provisions 26
Basic Procedural Fairness Provisions 28
Rules of Practice and Procedure 32
Power to Make Rules About Practice and Procedure 35
Power to Issue Practice Directives 36
Ministerial Approval Requirement 36
Statutory Powers and Procedures – Advisory Body 37
Administrative Justice Plans 38
Public Access to Information about Administrative Tribunal Statutory Powers, Procedures, Directives and Decisions 39
The Role of the Attorney General 39
Special Considerations 40
Conclusion and Recommendations 42
Recommendations 43

INTRODUCTION

The powers, procedures and functions of administrative tribunals are as diverse as the public policy concerns underlying the statutes that create them. There is a general concern that this diversity in powers and procedures is more a reflection of ad hoc decision making and political circumstance than the result of careful, comprehensive policy consideration of the specific needs of a given tribunal when it is created. Some variation is inevitable because powers and procedures need to be tailored to suit the needs and purposes of specific tribunals. At the same time, a principled and consistent approach to legislative decisions about what powers are appropriately granted to a tribunal, and how such powers are described, is highly desirable.

The comprehensive background paper, The Statutory Powers and Procedures of Administrative Tribunals in British Columbia,[1] the background paper, explores the important link between an administrative tribunal's powers and procedural obligations and its ability to deliver its public service mandate in a fair, efficient and effective manner. It also reviews the many studies that have been undertaken in Canada and elsewhere on the subject of statutory powers and procedures. While these studies universally reject the creation of a single comprehensive code of tribunal powers and procedures, they propose a number of alternatives designed to ensure a proper balance between procedural fairness and effective administration. The background paper outlines four options for reform in this area, aimed at encouraging discussion and debate on which option or combination of options should form the basis for a recommendation for specific reform. These four options can be summarized as follows:

> ***Option 1:*** *take no action and leave both powers and procedures issues to the present mix of legislation and common law relevant to each tribunal.*
>
> ***Option 2:*** *reform tribunals on a case-by-case basis and create a specialized advisory body at arm's length from both tribunals and government.*
>
> ***Option 3****: develop a Statutory Powers and Procedures Act and make decisions about tribunal powers and procedures through a specialized rules committee, the tribunals themselves or tribunals with final approval by either a minister or an external body.*

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[1] The Administrative Justice Project's background paper on statutory powers and procedures was released in February 2002 and is available online, at: http://www.gov.bc.ca/ajp.

> ***Option 4:*** *grant rule-making powers to tribunals with no additional legislative reform.*

In response to the background paper, the Administrative Justice Project received submissions from the following bodies:

- British Columbia Council of Administrative Tribunals2
- Office of the Ombudsman3
- West Coast Environmental Law Association
- Dispute Resolution Office, Justice Services Branch, Ministry of Attorney General
- Law Society of British Columbia
- British Columbia Labour Relations Board

This report summarizes responses to the background paper and recommends reforms in the area of statutory powers and procedures for administrative tribunals. Reforms respecting procedural powers are addressed separately from those addressing statutory powers concerns.

RESPONSES TO THE BACKGROUND PAPER

British Columbia Council of Administrative Tribunals

The British Columbia Council of Administrative Tribunals has a mandate to serve the public interest by contributing to the development and improvement of administrative tribunals, government agencies, the legal profession, advocacy groups and others. The British Columbia Council of Administrative Tribunals submitted a lengthy paper in response to the background papers on statutory powers, standard of review and Charter jurisdiction. It expressed strong support for the Project's reform initiatives generally and identified a number of challenges facing the administrative justice system including concerns that:

- tribunal rules of procedure are not always clear and efficient;
- tribunals do not always have the necessary powers to make their proceedings effective and expeditious;
- some tribunals face jurisdictional uncertainties that can delay or disrupt proceedings.

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2 The British Columbia Council of Administrative Tribunal's March 2002 paper, *Administrative Justice in British Columbia: Ensuring Fairness and Accountability*, is available on the internet at www.bccat.net.

3 Entitled *Statutory Powers and Procedures of Administrative Tribunals – Comments and Submission to the Administrative Justice Project of the Ministry of Attorney General, Province of British Columbia*, April 12, 2002.

The British Columbia Council on Administrative Tribunals made the following three recommendations:

Recommendation 1

An Administrative Justice Council should be established by legislation. It should consist of members from government, the tribunal community and the public generally. Its role should be to coordinate activities and advise government and tribunals on issues relevant to the effective and efficient functioning of the administrative justice system.

Recommendation 2

A comprehensive administrative justice plan should be established for each tribunal. The plan should be developed jointly by the responsible ministry, the tribunal chair and the Administrative Justice Council. It should set out a clear and specific strategy to ensure that the following key requirements of the tribunals are met, in a manner that is appropriate for that specific tribunal:

- *an appropriate and transparent appointment process;*
- *a clear understanding of the role of members in a tribunal and all the terms and conditions of their appointment (confirmed by way of an appointment agreement);*
- *clear and effective powers and procedures;*
- *adequate resources and remuneration in line with the standards established for the sector, and a clear understanding of the relationship between the tribunal and other government bodies in respect of adequate resources and remuneration.*

Recommendation 3

Any legislative reform regarding matters such as powers and procedures, standard of review and jurisdiction to decide Charter issues should contain sufficient flexibility to ensure that diversity among tribunals is respected and that increased efficiency and effectiveness is in fact realized. Consideration should be given to the role that an Administrative Justice Council might play in this regard. Examples include: assisting with the development of rules of procedure for specific tribunals, advising government on the appropriate standard of review for various tribunals and issues, and advising government on the issue of which tribunals should be given the authority to decide constitutional questions.

The British Columbia Council of Administrative Tribunals thus generally supports Option 2, provided that implementation of this option would ensure:

- sufficient flexibility to address the needs and circumstances of each individual tribunal;
- reduction of unnecessary disparity;

- changes "resulting in real improvements that more than offset the costs and complexity that may result from such changes";
- tribunals have a role in determining their statutory powers and procedures.

Law Society of British Columbia

The Law Society of British Columbia submitted a Preliminary Response to the Project's background papers. The response was prepared by the Access to Justice Subcommittee.

The Law Society is in agreement that the administrative justice system in this province is ripe for reform but cautioned that reform initiatives should be carefully undertaken. While it supports the Project's goals, the Law Society says that it:

> *... wishes to ensure that reforms are based on substantive considerations, not simply financial ones. If, for example, the result of reforms leaves the public with a sense of having a significant increase in their access to the justice system for the resolution of disputes with the government on administrative matters, the Law Society would consider the reforms to be a success.*

On the question of statutory powers and procedures, the Law Society says that administrative agencies must have the appropriate powers and procedures to properly discharge their mandates. The Law Society believes that clarification of powers in enabling legislation would be beneficial and that clear and sensible procedures result in easier and more effective access to administrative justice. It generally supports any effort to bring greater clarity to the contents of natural justice and procedural fairness for each individual tribunal. The Law Society also believes that:

> *... the diverse nature of the agencies and tribunals weighs against creating omnibus legislation concerning statutory powers and procedures.[4] A tribunal-by-tribunal review would be necessary before even making any attempt to identify areas of commonality between tribunals.*

[4] While the LSBC "believes that the rationale for rejecting a single code for tribunal powers and procedures extends to rejecting single comprehensive legislation on any aspect of administrative law", it notes that there "may be some common elements in these that can form some sort of 'base' legislation".

Thus the Law Society stressed that such tribunal-by-tribunal review is critical before legislation aimed at process clarification is enacted. The Law Society also stressed the need for legislative clarity:

> *Complex legislation simply leads more frequently than not to the necessity of going to court to obtain judicial interpretation on the meaning of legislation, often at some considerable cost and frequently requiring considerable time. If the legislation is to set out the procedural requirements of administrative agencies or tribunals, legislative clarity is all the more important. It is of little use to set out, in legislation, procedural requirements that are so complex or oblique as to require judicial interpretation. It would simply defeat the purpose. Legislation which has not fully considered the different needs, composition or expertise of all the components of the administrative justice system will do much more harm and create much more confusion than that which is presently thought to exist.*

Finally, the Law Society supports the idea that a tribunal-by-tribunal review be undertaken - either by the government (through the Ministry of the Attorney General), tribunals themselves or an independent body similar to the English Council of Tribunals.

Dispute Resolution Office, Justice Services Branch

The Dispute Resolution Office, Justice Services Branch, Ministry of Attorney General, is responsible for promoting the use of mediation and other dispute resolution processes in the courts and across government. The Dispute Resolution Office supports its work through research that demonstrates the value of alternatives to adjudication and by assisting government agencies and tribunals to develop innovative and effective dispute resolution processes. The Dispute Resolution Office's comments on the background paper focus on its mandate to promote a wide range of dispute resolution initiatives.

The Dispute Resolution Office supports Option 3. It agrees that administrative tribunals are often not given the powers they need to function effectively and creatively and that critical case management and tribunal management powers are often absent or inadequately addressed in individual statutes. The Dispute Resolution Office adds that:

> *While there are a growing number of administrative agencies which have inserted, or are interested in inserting, dispute resolution provisions into their governing legislation, the ad hoc manner in which they are currently developed leads to a number of difficulties. First, it results in inconsistency, the "inexplicable diversity" referred to by Mr. Falzon. Second, not all bodies developing new rules, regulations or legislation turn to experts for advice on dispute resolution processes and so do not consider either the full range of options or all the issues*

> *critical to a successful dispute resolution process. Finally, when some legislation explicitly refers to dispute resolution and other legislation does not, courts may interpret silence on the issue of dispute resolution in a statute to reflect the legislators' intention that the particular tribunal should not have dispute resolution powers.*
>
> *Legislation that provided a menu of powers that included dispute resolution and case management powers[5] could address some of these concerns. Such a menu would encourage administrative tribunals to consider the full range of dispute resolution options and provide some guidance about what issues need to be considered in creating detailed rules.*
>
> *The Dispute Resolution Office supports the development of individual powers and procedures by tribunals who are in the best position to tailor procedures to meet their needs... .*

The Dispute Resolution Office did not express an opinion as to whether final approval of an administrative tribunal's powers by a minister or the executive council was necessary. It was concerned that administrative tribunals be provided with consistent and expert advice in the development of their rules, accompanied by the necessary tools to implement them.

West Coast Environmental Law Association

The West Coast Environmental Law Association did not make any recommendations on the options identified in the background paper. However, it stressed that:

> *... any eventual proposal must be evaluated to see whether it increases the accessibility of administrative tribunals to lay people and to the public generally. Tribunals were created to a considerable degree to be a cheaper and accessible alternative to court processes, but in many cases have become increasingly confusing and esoteric to the lay person.*
>
> *The need to keep public and lay person accessibility front and center is especially important given the wide range of changes to administrative tribunal structures and appeal processes which we understand may be considered as part of the Administrative Justice Project.*

The association referenced several of the recommendations in the Report of the Frank Committee aimed at maintaining or increasing public accessibility to tribunals. These include: advising of right to apply to a tribunal, public hearings unless compelling reasons dictate otherwise, government departments not entitled to legal counsel unless citizen employs lawyer, citizen only to be deprived of lawyers in exceptional circumstances, citizens should never have to

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[5] The Dispute Resolution Office makes the point that case management often goes hand in hand with dispute resolution processes and can be a very effective means of getting at issues of costs and delay.

pay costs if dispute is with the government but government should have to pay reasonable expenses of successful applicants and in "party-party" disputes and costs should be awarded only with respect to frivolous applications. The association also noted the potential for improving public access by offering a wider range of dispute resolution processes.

Office of the Ombudsman

The Office of the Ombudsman expressed concerns "about the court-centered focus" of the background paper. The Ombudsman's submissions noted some alternative review mechanisms and identified some matters of particular concern to that office. In particular, the Ombudsman expressed concern that the background paper does not:

> *... consider agencies such as the Office of the Ombudsman and the Office of the Information and Privacy Commissioner which now have authority over administrative tribunals and can and do engage in oversight which has implications for current practice in a wide range of administrative agencies including tribunals and the Information and Privacy Commissioner deals with informational questions which may impact on the operation of tribunals.*
>
> ...
>
> *Influencing procedural change and appropriate use of power through raising awareness of fairness concepts and practices has been a hallmark of the work of the Ombudsman. Raising awareness has occurred through the investigative process, through both confidential and public comment, and through development and promotion of materials such as the Administrative Fairness Checklist.*
>
> *It is respectfully submitted that due regard should be given to the role of agencies other than the courts which have advisory and supervisory roles to play in the administrative justice system of British Columbia. In addition, enhancement of those roles should be considered in the context of either adoption of statutory powers and procedures legislation or creation of a council or commission which itself would have regulatory power over administrative tribunals.*

Of the options identified in the background paper, the Ombudsman favours a version of the third option. Specifically, the Ombudsman's view is that:

> *... It does... seem useful to establish in legislation a code of minimum standards and minimum procedural requirements which will encapsulate the essence of fair process.*
>
> *Furthermore it seems useful to embody in such legislation recognition of the powers and efforts of bodies such as the Ombudsman which have some supervisory oversight now. One way to do this in legislation related to the*

exercise of statutory powers of decisions is to allow reconsideration of such decisions based on review by the Ombudsman.

While a statutory powers and procedures act could set minimum procedural standards, it would not be appropriate for such legislation to set specific rules for a wide number of differing types of agencies. It seems more appropriate for such legislation to provide guidelines for rule making, to provide for some sort of supervision of rule making and to let tribunals make their own rules within the standards and processes outlined in the legislation.

In terms of supervision of rule making, a variety of possibilities are canvassed in the background paper. These range from Rules Committees through Councils of Tribunals to Ombudsman approval. Examples from the American context which are not reviewed in the paper but which at some point may bear in-depth analysis are Offices of Administrative Law and Regulatory Fairness Boards.

It is suggested that it is appropriate that there be some form of oversight of the rules and rule making processes of administrative tribunals. This supervision should fall to a body which is independent of government and the tribunals over which it will have jurisdiction. Such a body, whatever it is called, should have the task of reviewing and advising on rules made by the various tribunals. It is an issue as to whether or not such a body should be able to order the tribunals to set new rules and, while this might be seen as efficient, it might also be seen as intrusive in the independence of the tribunals themselves. Whether that body is to have an advisory role or will have the power to order changes in rules, review by the body of new and amended rules of tribunals should be mandatory. It is also suggested that the Ombudsman would have jurisdiction over this body.

British Columbia Labour Relations Board

The British Columbia Labour Relations Board limited its comments to the topics that were of direct interest to it. The board observed that section 126 of the *Labour Relations Code* provides it with a rule-making power that is similar to that outlined in Option 4 of the background paper. Specifically, section 126 requires the Labour Relations Board to "determine its own practice and procedure". It also gives the board discretion to "make rules governing its practice and procedure and the exercise of its powers" subject to ministerial approval. In consultation with the labour relations community, the board developed practice and procedure rules that were approved by the minister in 1994.

The Labour Relations Board made the following observations about its rules and rule-making powers:

We have found the statutory rule-making power, and the Rules themselves, to greatly assist in the fair, efficient and effective functioning of the Board. While Option 4 may not be suitable for all administrative tribunals, we believe that the

rule-making power status quo with respect to the Board has served the labour relations community well. We note in particular that the process by which the Board developed the Rules (i.e., in consultation with our user community) likely contributed greatly to their effectiveness and acceptability.

Accordingly, given the positive experience we have had with the Board's status quo of a statutory rule making power, the Board does not perceive a need for legislative reform which might potentially interfere with our ability to determine our own practice and procedure and to make our own rules (subject to ministerial approval).

We recognize that not all aspects of Options 2 and 3 would have that effect. However, we are concerned that some aspects of these options for legislative reform may have such an effect, intentionally or unintentionally. For example, while some tribunals might well wish for the assistance of an Option 2 advisory Council of Tribunals, we would be concerned that such an advisory body might add an unnecessary layer of bureaucracy to the Board's rule-making process. Similarly, we would be concerned that an Option 3 Statutory Powers and Procedures Act might limit or complicate the Board's ability to develop practices and procedures uniquely suited to the labour relations environment.

It may well be possible to implement reforms in the nature of Options 2 or 3 in such a way that assistance is provided to those tribunals which need and want it, without hindering the ability of tribunals such as the Board to determine their own practice and procedures and make their own rules. Accordingly, we would ask that, if legislative reform is undertaken, it be done with a clear recognition of the need to protect the practices, procedures and rule-making powers of tribunals such as the Board from unnecessary or unintended regulation or reform.

MODEL STATUTORY POWERS POLICY DOCUMENT

As the Law Society points out, the administrative justice system is not homogenous. It comprises tribunals and agencies that vary greatly in their expertise and in the complexity of their subject matter. To quote the Law Society "[t]here would be no point in having a sophisticated commission-like administrative system for the issuance of dog licenses".

The jurisdiction and subject matter of some tribunals are narrow in scope. Examples include the Public Service Appeal Board and Mental Health Review Panels. Others, such as the Labour Relations Board and the Securities Commission, have extensive, complex, polycentric regulatory oversight functions that involve many competing economic, political or social interests. Still other administrative tribunals exercise purely appellate functions. Examples here include the Elevating Devices Appeal Board and the Property Assessment Appeal Board. These examples illustrate

that a "one size fits all" approach to administrative justice reform is not sensible, feasible or desirable.

As administrative tribunals are creatures of statute, they only have those powers conferred on them by the legislature, either expressly or by necessary implication. Where a tribunal's powers are not expressly stated, or where they are not expressed with clarity, there is room for argument about their scope and whether other powers are necessarily implied. This may lead to the types of disruptive jurisdictional issues referred to by BCCAT in its submissions.[6] As between tribunals, conferring a specific (or slightly different) power on one tribunal but not another may compel a reviewing court to conclude that silence in the other tribunal's governing statute means such a power is not implied.

Tribunals' diversity necessitates flexibility in statutory provisions providing the source of their powers and procedures. However, to the extent that it is possible, the statutory language used to confer core powers should be consistently ascribed. A different or unique statutory expression of an individual tribunal's powers should signify a different or unique characteristic of that tribunal and not simply be the product of ad hoc, non-integrated policy development.

Statutory powers legislation could be used to establish a range or "menu" of core powers to be applied, as appropriate, to specific administrative tribunals through Schedules to the Act or cross-referencing in the tribunal's statute.[8] The idea of incorporating powers by reference to a more general or external statute is not unprecedented. For example, it is not unusual for a tribunal's enabling statute to incorporate by reference certain powers of a commission under the *Inquiry Act*, R.S.B.C. 1996, c. 224. Examples are found in the *Environment Management Act* (section 11(11)), the *Expropriation Act* (section 26(7)), the *Employment Standards Act* (section 108(1)), the *Human Rights Code* (section 34(3)), the *Labour Relations Code* (section 123) and the *Health Care (Consent) and Care Facility (Admission) Act* (section 29(9)). Incorporation by reference often provides administrative tribunals with the powers of a commissioner under sections 12

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6 Judicial review of administrative tribunal decisions has appropriately been said to involve a specialized branch of statutory interpretation, the central focus of which is a search for legislative intent. Clear and consistent statutory expression of tribunal powers will do much to minimize unnecessary and sometimes protracted judicial review and statutory appeal proceeding.

7 For example, the Alberta Administrative Procedures Act enables the Lieutenant Governor in Council to designate, by order, the tribunals to which that Act applies and to specify which parts of the Act apply to each designated tribunal.

(protection of commissioners), 15 (power to summon witnesses) and 16 (power to enforce summons and punish for contempt) of that Act. These sections provide:

> 12 A commissioner appointed under this Part has the same protection and privileges, in the case of an action brought for an act done or omitted to be done in the execution of the commissioner's duties, as are by law given to the judges of the Supreme Court.
>
> 15(1) The commissioners acting under a commission issued under this Part, by summons, may require a person
>
> (a) to attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons, and
>
> (b) to bring and produce before them all documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry.
>
> (2) A person named in and served with a summons must attend before the commissioners and answer on oath, unless the commissioners direct otherwise, all questions touching the subject matter of the inquiry, and produce all documents, writings, books, deeds and papers in accordance with the summons.
>
> 16(1) The commissioners have the same powers, to be exercised in the same way, as judges of the Supreme Court, if
>
> (a) any person on whom a summons has been served by the delivery of it to the person, or by leaving it at the person's usual residence,
>
> (i) fails to appear before the commissioners at the time and place specified in the summons, or
>
> (ii) having appeared before the commissioners, refuses to be sworn, to answer questions put to the person by the commissioners, or to produce and show to the commissioners any documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry, or
>
> (b) a person is guilty of contempt of the commissioners or their office.
>
> (2) All jailers, sheriffs, constables, bailiffs and all other police officers must assist the commissioners in the execution of their office.

The *Inquiry Act* was enacted to address the powers to be given to judges of the Supreme Court who were appointed from time to time to carry out inquiries and report on government departments or conduct. Although this legislation was not intended or designed to provide a source of powers for administrative tribunals, it came to be used for that purpose. In more recent years, in part due to concerns about purporting to give administrative tribunals powers traditionally associated with the inherent jurisdiction of superior court judges (and as the occasion presented itself), legislative counsel have drafted similar provisions that are specifically tailored to

administrative tribunals and are expressed in simpler language. For example, sections 15 and 19[9] of the *Commercial Appeals Commission Act*, R.S.B.C. 1996, c. 54 provide:

> ***Witnesses***
>
> 15(1) The commission or a member has the same power
>
> (a) to summon and enforce the attendance of witnesses,
>
> (b) to compel witnesses to give evidence on oath or in any other manner, and
>
> (c) to compel witnesses to produce records and things,
>
> that the Supreme Court has for the trial of civil actions.
>
> (2) When the commission or a member exercises a power under subsection (1), a person who fails or refuses
>
> (a) to attend,
>
> (b) to take an oath,
>
> (c) to answer questions, or
>
> (d) to produce the records or things in the person's custody or possession,
>
> is liable, on application to the Supreme Court, to be committed for contempt as if in breach of an order or judgment of the Supreme Court.
>
> (3) Section 34(5) of the *Evidence Act* does not apply.
>
> ...
>
> ***Order for compliance***
>
> 19(1) If it appears that a person has failed to comply with an order or decision of the commission or a member, the commission or a party may apply to the Supreme Court for an order
>
> (a) directing the person to comply with the order or decision, and
>
> (b) directing the directors and senior officers of the person to cause the person to comply with the order or decision.
>
> (2) On an application under subsection (1), the court may make the order requested or another order it thinks proper.
>
> (3) An application may be made under subsection (1) even though a penalty has already been imposed on that person for the noncompliance.

These types of provisions are clearly more tailored to the nature and function of administrative tribunals and dispense with the need, for example, to grapple with (or litigate) difficult issues

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[9] Shortly after the *Commercial Appeals Commission Act* was enacted, similar provisions to those set out in sections 15 to 17 of that Act were added to the *Securities Act* (s. 144). Subsequently, several similar provisions have been included in other statutes: e.g., *Assessment Act*, ss. 39, 58 and 59; *Credit Union Incorporation Act*, s. 97; *Employment Investment Act*, s. 38; *Business Venture Capital Act*, s. 32; *Trade Practice Act*, s. 10 (2.3) and (2.4).

related to the extent to which a tribunal can exercise contempt powers. They also provide clear procedures for enforcement, rather than leaving such questions to be determined by courts. Provisions of this nature lead to a more efficient and effective means of administering the tribunal's enabling statute.

Other Canadian jurisdictions have enacted statutory powers legislation which applies in whole or in part to certain categories or types of administrative tribunals. The examples canvassed in the background paper are the Alberta *Administrative Procedures Act*, the Ontario *Statutory Powers Procedure Act* and, from Quebec, *An Act Respecting Administrative Justice*. It is apparent that there is some support for establishing similar legislation in this jurisdiction.

The advantage of legislated statutory powers is that reform initiatives are mandatory rather than reliant on a commitment to apply guidelines. However, there are two main drawbacks to the use of statutory powers legislation.

The first is that such legislation does not allow for individual powers to be crafted in a way that reflects the unique and specific needs of each tribunal, as discussed earlier in this report. For example, some administrative tribunals (like the Labour Relations Board) have been given statutory discovery powers that are designed to reflect their specific mandate and needs.[10] In such cases, the unique statutory expression of the tribunal's powers is reasonably and explicably justified and should not be interfered with.

The second drawback is that the idea of incorporating powers by reference (or some like mechanism) means that a review of the enabling statute will not provide the reader with an immediate understanding of the administrative tribunal's powers and procedures. An important feature of access to justice is ensuring that the parties appearing before the administrative tribunal have clear, understandable, "reader-friendly" information about the tribunal's powers and procedures. It is therefore desirable that the tribunal's constituent statute provide the source of all of the administrative tribunal's powers.

It is proposed that, as a first step, a policy document entitled the Model Statutory Power Provisions for Administrative Tribunals be developed through the Legislative Counsel's Office with the policy and legal advice of a special advisory body. This body would be established within the Ministry of the Attorney General and would include the staff of the Administrative Justice

[10] Other examples are found in the *Assessment Act* with respect to review panels (section 38).

Office, representatives of the Dispute Resolution Office, host ministry representatives and administrative law experts. The Circle of Chairs and the BCCAT would be invited to participate and make representations on behalf of their memberships. The work of the advisory body would be coordinated by the Administrative Justice Office.

The resulting policy document would set out a menu of model statutory power provisions that could be selectively applied (with any necessary adjustments) to individual administrative tribunals, with alternative provisions in respect of some powers. For example, the type of practice and procedure rule-making power appropriate for a first instance adjudication body will generally be different from the type of rule-making power appropriate for an appeal tribunal. Similarly, the type of rule-making power appropriate for tribunals processing a high volume of matters within limited and fixed time constraints will likely be different from those appropriate for tribunals like the Human Rights Tribunal and the Expropriation Compensation Board.

These model powers would be developed having reference to the existing statutory powers of some administrative tribunals, statutory powers legislation in other jurisdictions and the model provisions developed by the Society of Ontario Adjudicators and Regulators[11] and the English Council on Tribunals.[12]

As an alternative to the enactment of a *Statutory Powers Act*, the Model Statutory Power Provisions for Administrative Tribunals could be implemented as Legislative Counsel Office guidelines. This approach would provide drafting flexibility. It would also achieve significantly greater uniformity and consistency in the types of statutory powers that administrative tribunals have and ensure that each tribunal's enabling statute is the only source of its powers.

Once a policy document has been developed and the tribunal-by-tribunal review process discussed below is completed, the government will be better situated to assess whether the model powers set out in the policy document should be implemented through guidelines or through legislation.

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11 Ontario Rules: A model for administrative justice agencies (November 2000), http://www.soar.on.ca/soar-rules_prac.htm.

12 Model Rules of Procedure for Tribunals, http://www.council-on-tribunals.gov.uk/specialreports/mrp/modelrules.htm.

Differentiating between Powers and Procedures

At common law (and absent contrary or overriding statutory direction) administrative tribunals are masters of their own procedures. Drawing the line between those types of powers that are more procedural than substantive in nature (and therefore may not require express statutory authority) and those that must be grounded in legislation is not always straightforward. This point was made in the background paper (p. 62):

> *It is not clear at common law whether the power to make rules regarding "practice and procedure" encompasses important powers some may seek to characterize as "substantive" – for example, powers to summarily dismiss appeals, grant interim relief, compel witnesses to give evidence, order costs or reconsider decisions. Such uncertainty tends to invite litigation. Nor does it address important issues such as the role of the chair and the ability of members to complete work after the expiry of their terms.*

A similar point was made by the English Council of Tribunals in its interim revision to the earlier Report on Model Rules of Procedure. The council observed that it "is highly desirable when drafting legislation which will establish a new tribunal to give early and detailed consideration to the powers and procedures of the tribunal so as to ensure that the rule-making power is adequate. A power to make rules for 'the practice and procedure' of the tribunal or for 'regulating the exercise of the right of appeal' is unlikely to suffice for the needs of a modern tribunal". To provide guidance on the matter, the council included a Checklist of Matters to be Considered when Preparing Legislation Establishing a Tribunal or other Adjudicative Body which:

> *... lists common form elements relating to the establishment, functioning and procedure of tribunals and other bodies with adjudicative functions. It is divided for convenience into two parts; part A lists those matters which in many cases are to be found substantively in the principal legislation; part B lists those matters which are frequently the subject of rule-making powers. There is no hard and fast practice as to whether matters fall into part A or part B ... .*

In order to eliminate any room for legal debate about whether a certain power requires express statutory authority or whether it is of a procedural nature (and thus within the tribunal's domain, subject always to natural justice considerations), it is recommended that the administrative tribunal's core powers be detailed in the tribunal's enabling statute.

What types of core powers should administrative tribunals have? The English Council of Tribunals (Annex A, Interim Report) lists a number of broad categories of "matters for consideration for inclusion in rule-making powers". These broad categories may be generally described this way: matters relating to the establishment, composition and sittings of the

tribunals; general provision for practice and procedure; and specific matters that may be the subject of rules expanding. These specific matters include: time limits, parties, preliminary questions, evidence, sanctions for failure to comply with procedural requirements, appearance/representation, hearing powers, decisions, delegation of powers, costs, enforcement, publicity and notice (e.g. service of documents) and ancillary powers.

Recognizing that each tribunal will need statutory powers suited to its individual mandate and functions, the following types of powers could form the subject of the Model Statutory Power Provisions for Administrative Tribunals:

- power to make rules governing the administrative tribunal's practices and procedures
- power to issue practice directives
- power to make orders in respect of pre-hearing matters such as document production, exchange of will-say statements, provision of particulars and pre-hearing examination of a party on oath or solemn affirmation or by affidavit
- power requiring parties to attend pre-hearing conferences to consider such matters as the settlement of any or all of the issues, defining and simplification of the issues, facts or evidence that may be agreed upon, dates by which steps in the proceeding are to be taken or begun, time estimates or like matters aimed at simplifying or accelerating the conduct of the hearing[13]
- powers relating to dispute resolution, such as powers to: issue orders giving effect to consensual agreements, engage in alternative dispute resolution at any point, protect confidentiality of statements made and materials used during alternative dispute resolution, engage in mandatory alternative dispute resolution and authorize tribunal members to participate in alternative dispute resolution processes
- power to summon witnesses and administer oaths/affirmations
- power to disallow late documents
- power to shorten or extend deadlines or time periods
- power to make interim or consent orders
- power to retain expert witnesses

[13] For example, section 54 of the *Assessment Act* gives the Property Assessment Appeal Board powers, subject to the Act and regulations, to make "any order the board considers necessary to facilitate just and timely resolutions of appeals" and without limitation to makes orders: (a) requiring the parties to the appeal to file written submissions with the board in respect of all or any part of the proceeding, (b) respecting the filing of admissions by parties, (c) respecting disclosure, including, without limitation, prehearing examination of a party on oath or solemn affirmation or by affidavit, (d) respecting exchange of records by parties, (e) directing the joining of appeals, issues or parties, and (f) requiring the parties to attend a confidential, without prejudice, prehearing conference in order to discuss issues in the appeal and the possibility of simplifying and disposing of those issues, and for this purpose, the board may order that the conference not be open to the public.

- power to summarily dismiss claims if, for example, a proceeding is outside the tribunal's jurisdiction; is frivolous, vexatious or commenced in bad faith; or if an applicant fails or refuses to comply with the tribunal procedures;[14]
- power to dismiss an appeal for failure to comply with a tribunal order[15]
- discretion to grant or refuse to grant adjournments if, for example, adjournment will not cause unreasonable delay in the proceeding or a denial of justice, or if for the purpose of fostering a settlement
- power to add parties or intervenors[16]
- power to consolidate or sever proceedings
- power to relieve against technical irregularities or procedural errors that do no result in a denial of fairness, on just and reasonable terms
- discretion to conduct oral, written or electronic hearings[17]
- power to proceed with a hearing in the absence of a party where notice has been given and the party does not attend or participate[18]
- power enabling the chair of the administrative tribunal to specify tribunal size[19] and clarification that panels have the power and authority of the board where such panels are established
- provision defining the role of chair
- discretion to consider evidence whether or not it is admissible in a court of law
- discretion to hear evidence in public or *in camera*
- power to award costs
- power/requirement to publish decisions[20]
- power to stay or suspend a decision of the administrative tribunal pending appeal
- power to refer a question of law to the Supreme Court.[21]

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14 See, for example, section 114 of the Employment Standards Act which gives the Chair of the Employment Standards Tribunal the discretion to dismiss an appeal "without a hearing of any kind" if she is satisfied that the appeal was not requested within the statutory time limit, is not within the Tribunal's jurisdiction, is frivolous, vexatious, trivial or brought in bad faith.

15 See, for example, section 54(3) of the *Assessment Act.*

16 See Report and Recommendations on Standing before Administrative Tribunals on Judicial Review.

17 See, for example, section 55 of the *Assessment Act* and sections 5.1 and 5.2 of the Ontario *Statutory Powers Procedure Act.*

18 See, for example, section 54(4)-(5) of the *Assessment Act* and section 7 of the Ontario *Statutory Powers Procedure Act.*

19 See for example, section 11(7) of the *Environment Management Act*, section 106 of the *Employment Standards Act,* and section 22(2) of the *Elevating Devices Safety Act.*

20 See, for example, section 111 of the *Employment Standards Act* which requires the Chair of the Employment Standards Tribunal to "ensure that all orders made by the tribunal on appeals and reconsiderations and all recommendations made by the tribunal on exclusions are available in writing for publication".

21 Section 64 of the *Assessment Act* gives the Property Assessment Appeal Board the power to refer questions of law to the Supreme Court in the form of a stated case.

It might also be appropriate to include the following types of provisions in statutory powers legislation:

- basic or minimum procedural fairness provisions, such as those referred to below
- power to decide all questions of fact and law[22] arising in the proceedings[23]
- clarification of an administrative tribunal's immunity from suit
- power to reconsider the administrative tribunal's decisions on specified grounds[24]
- power enabling a party (and/or the tribunal) to file and enforce an order of the administrative tribunal as an order of the Supreme Court.

Selected Examples and Some Issues

A brief discussion of some of the specific types of powers enumerated above will help to illustrate the diversity between different administrative tribunals. It will also highlight some of the policy considerations that should be taken into account in drafting statutory powers legislation and determining which powers are appropriate for individual tribunals. (This discussion and subsequent discussions will, for illustrative purposes, include references to provisions in legislation that is the subject of proposed repeal or amendment.)

Power to Organize the Composition of the Board

Many statutes provide that the administrative tribunal can establish panels, including panels of one member, although there is little consistency in the statutory language used. For example, section 18(6) of the *Public Service Act* provides that a member of the Public Service Appeal Board "may sit alone or the chair may appoint a panel consisting of 3 members to hear and decide an appeal". Section 34 of the *Human Rights Code* provides an example of a similar but more detailed power:

> 34(1) A complaint ... is to be heard by
>
> (a) a single member of the tribunal designated by the chair, or
>
> (b) a panel of 3 members of the tribunal designated by the chair.
>
> (2) If a panel is designated under subsection (1)(b), the chair must designate one of the members of the panel to preside.

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22 With exceptions for some constitutional questions: see Report and Recommendations on Charter Jurisdiction.

23 An example of this is found in section 108(2) of the *Employment Standards Act*.

24 See Report and Recommendations on Designing Administrative Processes.

(3) A member or panel has, the for the purposes of this Act,

(a) the protection and privileges of a commissioner under section 12 of the Inquiry Act, and

(b) the powers of a commissioner under sections 15 and 16 of that Act.

(4) A member of the tribunal who resigns or whose appointment to the tribunal terminates may continue to act as a member in a hearing that has begun until an order is made under section 37 regarding the complaint.

Section 44 of the *Assessment Act* provides a good example of a comprehensive provision respecting the organization of an administrative tribunal, the Property Assessment Appeal Board. It provides:

Organization of the board

44(1) The chair of the board[25] may organize the board into panels, each comprised of one or more members,

(2) If the chair organizes a panel comprised of more than one member, the chair must designate one of those members as chair of the panel.

(3) The members of the board may sit

(a) as a board, or

(b) as a panel of the board,

and 2 or more panels may sit at the same time.

(4) If members of the board sit as a panel,

(a) the panel has the jurisdiction of, and may exercise and perform the powers and duties of the board, and

(b) an order, decision or action of the panel is an order, decision or action of the board.

(5) The decision of a majority of the members of a panel of the board is a decision of the board and, in the case of a tie, the decision of the chair of the panel governs.

(6) If a member of a panel is unable for any reason to complete the member's duties, the remaining members of that panel may, with consent of the chair of the board, continue to hear and determine the matter, and the vacancy does not invalidate the proceeding.

(7) A member who resigns or whose term expires may continue to sit and make determinations in a proceeding if the member was assigned to the proceeding during

[25] The statute also provides that the board chair "is the chief executive officer of the board". Where the chair is unable to act, the vice chair is able to act in the chair's place: section 43(4), (5).

> office and all determinations made by that member are as effective as though he or she holds office.

Not only does this comprehensive language provide sufficient flexibility to enable a tribunal to organize itself in the most efficient and effective way, it also ensures there is no room for debate about such questions as the powers of individual panels, the effect of the expiration of a member's appointment and the effect of panel decisions.[26]

Power to Admit Evidence

The power to admit evidence is dealt with in many ways. Some statutes are silent on the question while others express the tribunal's ability to consider and admit evidence in diverse ways. Compare, for example, the following provisions from a number of different statutes:

> ***Labour Relations Code***
>
> 124(1) The board may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it considers proper, whether or not the evidence is admissible in a court of law.
>
> ***Property Assessment Appeal Board***
>
> 56(1) In an appeal under this Part, the board may admit any oral or written testimony or any record or thing as evidence in the appeal, whether or not admissible as evidence in a court of law or given or proven under oath or solemn affirmation.
>
> (2) The board may not admit as evidence in an appeal anything that is privileged under the laws of evidence.
>
> ***Commercial Appeals Commission Act***
>
> 17(1) The commission may admit as evidence in an appeal, whether or not given or proven under oath or admissible as evidence in a court,
>
> (a) any oral testimony, or
>
> (b) any record or other thing
>
> relevant to the subject matter of the appeal, and the commission may act on the evidence.
>
> (2) Nothing is admissible in evidence before the commission or a member that is inadmissible in a court because of a privilege under the law of evidence.

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[26] Similar examples of this type of comprehensive provision are found in the *Elevating Devices Safety Act* and the *Electrical Safety Act*.

(3) Subsection (1) does not override an Act expressly limiting the extent to which or purposes for which evidence may be admitted or used in any proceeding.

Coroners Act[27]

41(1) Subject to subsections (2) and (3), a coroner may

(a) admit as evidence at an inquest, whether or not admissible as evidence in any court, any oral testimony and any document or other thing relevant to the purposes of the inquest,

(b) act on the evidence admitted under paragraph (a),

(c) exclude anything unduly repetitious or anything that the coroner considers does not meet the standards of proof commonly relied on by reasonably prudent persons in the conduct of their own affairs, and

(d) comment on the weight that ought to be given to any particular evidence.

(2) Nothing is admissible in evidence at an inquest

(a) that would be inadmissible in a court because of any privilege under the law of evidence, or

(b) that is inadmissible by the Act under which the proceedings arise or any other Act.

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.

Human Rights Code

35(3) A member of a panel may receive and accept on oath, by affidavit or otherwise, evidence and information that the member or panel considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law.

There should be more consistency in the power to admit evidence. Additionally, absent special circumstances, this power should reflect common law principles. Consideration should also be given to the question of setting out what evidence is not admissible. This could include privileged evidence or information or evidence otherwise rendered inadmissible by express statutory provision.

[27] See also sections 42 (written record of evidence) and 43 (copies of documents) of that Act.

Open or *In Camera* Hearings

Many statutes are silent on the question of whether the administrative tribunal has power to accept and consider evidence on an *in camera* basis. Examples include the *Expropriation Act*, the *Employment Standards Act* and the *Health Care (Consent) and Care Facility (Admission) Act*. Other statutes address the question directly. For example, section 14 of the *Commercial Appeals Commission Act* presumes that, as a general rule, commission hearings will be open to the public. However, under that statute, the commission is given a discretion to exclude the public for all or part of a hearing if the commission is of the view "that a public hearing would be unduly prejudicial to a party or a witness and that it would not be contrary to the public interest".

In Ontario, the *Statutory Powers Procedure Act* (section 9) provides that oral, written and, if practicable, electronic hearings must be open to or accessible by the public unless the tribunal is of the opinion that in matters involving public security or in intimate financial or personal matters the desirability of avoiding disclosure, in the interests of any person affected or in the public interest, outweighs the desirability of adhering to the principles that hearings be open to the public.

The Quebec legislation, *An Act Respecting Administrative Justice*, requires that the hearings of tribunals exercising adjudicative functions "shall be held in public" unless the tribunal orders the hearing to be held in camera "where necessary to maintain public order". Section 131 of that Act further elaborates on non-disclosure or publication of certain evidence:

> 131 The Tribunal may, of its own initiative or on application by a party, ban or restrict the disclosure, publication or dissemination of any information or documents it indicates, where necessary to maintain public order or where the confidential nature of the information or documents requires the prohibition or restriction to ensure the proper administration of justice.

Should administrative tribunals have the statutory discretion to determine whether to conduct proceedings, in whole or in part, *in camera*? If so, the government also needs to determine whether such discretion should be broadly stated (so the tribunal has the flexibility to set its own criteria for exercising its discretion in its rules of practice and procedure) or statutorily constrained by reference to limited or specific circumstances.

Other Issues Relating to Pre-Hearing Disclosure

One issue that arises indirectly as a result of providing administrative tribunals with effective pre-hearing disclosure powers concerns the *Freedom of Information and Protection of Privacy Act*. It

is not unusual, in either an administrative tribunal or civil litigation context, to see this legislation used as a means of pre-hearing discovery. At present, the Act does not give the Information and Privacy Commissioner discretion to decline a request in circumstances where the type of information sought can be obtained through administrative tribunal pre-hearing disclosure processes.

Where a tribunal has established, effective pre-hearing powers to require disclosure of records relevant to the issues before it, some consideration should be given as to whether the *Freedom of Information and Protection of Privacy Act* should be amended to give the Information and Privacy Commissioner the discretion to decline access requests in these circumstances.

A related question concerns the confidential nature of information relating to mediation and settlement processes.[28] This question is considered in a separate report for the Administrative Justice Project titled Dispute Resolution.[29]

Enforcement Powers

Some statutes are silent as to how an administrative tribunal order or decision can be enforced in the event of non-compliance with it. Examples include the *Environment Management Act* and the *Community Care Facility Act*.[30] Other statutes specify enforcement mechanisms but do so in different ways. For example, section 19 of the *Commercial Appeals Commission Act* gives both the commission and the parties the ability to apply to the Supreme Court for an order directing compliance. Similarly, section 39 of the *Human Rights Code* gives a party the ability to "file a certified copy of the order with the Supreme Court" in which case such order is expressed to have

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28 Some statutes expressly address the confidential nature of these processes. For example, section 146 of the *Labour Relations Code* provides: "(1) The minister may receive and hold in confidence a proposal made by a party for settlement of a dispute or difference. (2) If information relates to the business or affairs of any person, whether or not a party to a dispute, difference or other reference, the minister, if he or she believes disclosure of the information would be prejudicial to the person, may direct that the information must not be made public or that it be made public in the manner he or she directs. (3) Information obtained for the purpose of this Code in the course of his or her duties by a member of the board, an industrial inquiry commission or other tribunal under this Code, a special officer, a mediator or other person appointed under this Code, an employee of any of them or an employee under the administration of the minister is not open to inspection by a person or a court, and the member, special officer, mediator or other person appointed under this Code or employee must not be required by a court or tribunal to give evidence relative to it".

29 The report on Dispute Resolution is available on the Project's website, at: http://www.gov.bc.ca/ajp.

30 Although Bill 16, the *Community Care Facility Act*, has a provision enabling the chair of the Board to file a Board order in the Supreme Court. Once filed such an order "is enforceable in the same manner as an order of the Supreme Court" (section 19).

"the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court". Section 26(4) of the *Expropriation Act* provides that certificates issued by the Expropriation Compensation Board "may be filed in a registry of the supreme court and may be enforced as though it were an order of that court". Section 135 of the *Labour Relations Code* provides that:

> 135(1) The board must on request by any party or may on its own motion file in a Supreme Court registry at any time a copy of a decision or order made by the board under this Code, a collective agreement or the regulations.
>
> (2) The decision or order must be filed as if it were an order of the court, and on being filed it is deemed for all purposes except appeal from it to be an order of the Supreme Court and enforceable as such.

Section 59 of the *Assessment Act* contains a slightly different provision. It provides:

> **Order for compliance**
>
> 59(1) The board or a party to an appeal under this Part may apply to the Supreme Court for an order
>
> (a) directing a person to comply with an order or decision of the board under this Part, and
>
> (b) directing any directors and officers of the person to cause the person to comply with an order or decision of the board under this Part.

Statutory mechanisms for enforcement are preferable to statutory silence on the point. As the examples above illustrate, where such provisions do exist, there are varying descriptions of them. While there may be policy considerations relating to the question of who should be able to apply to court for a compliance order, there is no obvious reason why the mechanism itself cannot be described across statutes in more uniform terms.

Power to Reconsider

At common law, all administrative tribunals have a limited ability to reopen their decisions. Where the tribunal's enabling statute is silent on the point, the extent to which such a power exists may be the subject of some uncertainty and thus the subject also of litigation. Specifying the circumstances in which an administrative tribunal has power to reconsider its decisions is desirable. Similarly, policy choices should be made as to whether the reconsideration power should be a general one or be narrowly circumscribed, similar to the court's limited ability to reopen cases under the *functus officio* doctrine.

Some statutes enable the administrative tribunal to reconsider its decisions either generally or in limited circumstances. For example, the *Coroners Act* allows the Chief Coroner to direct a coroner to reconsider an inquiry on grounds that new evidence has arisen or been discovered, if that evidence is "substantial and material to the inquiry" and "did not exist at the time of the inquiry or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered" (section 20(5) and (6)).

Section 141 of the *Labour Relations Code* gives the Labour Relations Board the power to grant leave to reconsider and, if leave is granted, power to "vary or cancel the decision that is the subject of reconsideration or ... remit the matter to the original panel". Leave to apply for reconsideration may only be granted if the Labour Relations Board is satisfied that: (a) evidence not available at the time of the original decision has become available, or (b) the decision of the board is inconsistent with the principles expressed or implied in this Code or in any other Act dealing with labour relations. Section 116(1) of the *Employment Standards Act* gives the Employment Standards Tribunal broad power to reconsider any of its orders or decisions.

The Quebec *Act Respecting Administrative Justice* gives tribunals the discretion to "confirm, vary or quash the contested decision and, if appropriate, make the decision which, in its opinion should have been made initially". The legislation further specifies the circumstances in which a review or revocation of a tribunal decision would be appropriate, namely:

- where a new fact is discovered which, had it been known in time, could have warranted a different decision;
- where a party, owing to reasons considered sufficient, could not be heard;
- where a substantive or procedural defect is of a nature likely to invalidate the decision.

The Ontario *Statutory Powers Procedure Act* contains an express provision enabling the tribunal to "at any time correct a typographical error, error of calculation or similar error made in its decision or order" (section 21.1). This provision reflects the common law "slip rule" developed in judicial proceedings and extended to administrative tribunal proceedings. Section 21.2 gives an administrative tribunal a broad discretion to "review all or part of its own decision or order, and ... confirm, vary, suspend or cancel the decision or order".

Administrative Tribunal Protection or Immunity Provisions

Through the mechanism of incorporation by reference to the *Inquiry Act*, some administrative tribunals are granted "the same protection and privileges, in the case of an action brought for an

act done or omitted to be done in the execution of the [tribunal's] duties, as are by law given to the judges of the Supreme Court". See, for example, section 14 of the *Parole Act*.

In other cases, the administrative tribunal's enabling statute will contain an express provision respecting immunity from suit. Typically the protection from liability extends to damages caused by an act or omission in the good faith exercise/performance or purported exercise/performance of duties and powers. Where this occurs, the statutory expression of the immunity varies from tribunal to tribunal. For example, section 13 of the *Environment Management Act* provides that "[n]o action may be brought against the board, a panel or any person for anything done or omitted in good faith in the performance or intended performance of a power conferred or a duty imposed under this Act or any other enactment administered by the minister". Section 33(1) of the *Health Care (Consent) and Care Facility (Admission) Act* provides that "[n]o action may be brought or continued against a person for any act or omission in the performance of a duty or the exercise of a power or function under this Act if the person has acted in good faith and used reasonable care".

Section 19 of the *Community Care Facility Act* provides in part that "[a]n action for damages does not lie and must not be instituted against the director, a medical health officer or a member of the board or a panel or a person acting on behalf or under the direction of any of them because of anything done or omitted in good faith in the performance or intended performance of any duty or the exercise or intended exercise of any power under this Act or the regulations". Section 24(3) of the proposed *Community Care Facility Act* (tabled in the Spring Session in 2002 as Bill 16) further provides that "[a] member of the board is not, in a civil action to which the member is not a party, required to testify or produce evidence about records or information obtained in the discharge of duties under this Act".

In still other cases, the administrative tribunal's enabling statute is silent on the point. Examples include the *Human Rights Code* and the *Labour Relations Code*.

Thus immunity provisions appear to be included on a rather ad hoc basis, indicating a lack of a clear policy rationale for determining when to appropriately include such provisions and to whom they should be extended.

In determining whether a general immunity provision should be incorporated into statutory powers legislation, the first policy question to be addressed is whether such a provision is legally necessary. If not, then consideration should be given to the question of whether there other

compelling policy reasons why such a provision should be included in statutory powers legislation (as has been done in Ontario).

The common law provides immunity in negligence for the good faith exercise of quasi-judicial powers.[31] Arguably, the common law has been codified by section 3(2) of the *Crown Proceeding Act* which provides immunity for actions of a "judicial nature". Additionally, the government has developed policy directives, under the *Public Service Act*, indemnifying employees who act in good faith in the course of their employment and, as a matter of policy, the government will defend legal actions against these employees and indemnify them for the costs of judgments or out-of-court settlements. Moreover, through the Risk Management Branch, the government provides similar indemnity protection to persons appointed to government agencies, boards and commissions (as well as those appointed to boards of Crown corporations or nominated by government to non-government boards). Thus many would say that statutory immunity clauses are neither necessary nor useful and further, are not necessarily effective as courts tend to construe these types of liability exceptions very narrowly (see, for example, *Dorman Timber Ltd. v. British Columbia*, [1997] B.C.J. No. 2117 (C.A.) (Q.L.)). Finally, the statutory interpretation questions raised by the inclusion of these types of provisions have led to some unanticipated developments in the law.

The problems caused by the *ad hoc* inclusion and statutory wording of immunity provisions logically compel a conclusion that either this type of provision be uniformly included (for example, through statutory powers legislation) or uniformly excluded (through statutory repeal).

Basic Procedural Fairness Provisions

At common law, all administrative tribunals exercising decision making functions are bound by the principles of natural justice and procedural fairness. A tribunal's general common law duty to act

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31 See, for example, *French v. Law Society of Upper Canada* (1975), 61 D.L.R. (3d) 28 (Ont. C.A.), *Voratovic v. Law Society of Upper Canada* (1978), 87 D.L.R. (3d) 140 (Ont. H.C.J.), *Calvert v. Law Society of Upper Canada* (1981), 121 D.L.R. (3d) 169 (Ont. H.C.J.), *Harrington (Public Trustee of) v. Pappachristos* (1992), 5 Admin. L.R. (2d) 131 (B.C.S.C. Master), affm'd (1992), 75 B.C.L.R. (2d) 121 (S.C.), *Harrison v. Camgoz*, [1997] 2 W.W.R. 615 (Sask. Q.B.), *Edwards v. Law Society of Upper Canada*, (2000) 188 D.L.R. (4th) 613 (Ont. C.A.); upheld [2001] S.C.J. No. 77.

fairly is incapable of precise definition. In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, the Court held that:

> ¶49 *... every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work a system that is flexible, adapted to their needs and fair ... the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome ....*

The issue that arises for consideration is whether the tribunal's enabling statute should expressly provide for some basic or core procedural fairness requirements (especially in relation to hearings and decision making) or whether the appropriate fairness requirements should be left to be determined by the common law.

At common law, the contents of procedural fairness will vary depending on such factors as the nature of the decision maker and the decision, the impact of the decision on the party or parties appearing before the decision maker and the statutory context. At minimum, common law procedural fairness rules require that parties appearing before an administrative tribunal be provided with a right to know the case against them and an opportunity to be heard. These rules also require the administrative tribunal to be unbiased and impartial. The general duty to act fairly has been described this way:

> *Administrative action is subject to judicial review on the ground of procedural impropriety. In particular, many public decision-makers are under a legal duty to afford to interested persons a fair opportunity to participate in the decision making process before any action is taken that is detrimental to their interests. These participatory rights may be found under different labels. At common law, the notions of the "rules of natural justice" and more recently, "the duty of fairness", are frequently used to denote the several rules and principles that provide those participatory rights. As well, of course, statutes may require an opportunity for a "hearing" or impose a duty to "consult" before a particular statutory power is exercised ... .*
>
> *... because of the wide range of circumstances in which the duty of fairness applies, its content is not monolithic. In some situations it may call for a procedure that is barely distinguishable from that followed in the courts of law, including, for example, personal service of notice, full disclosure of relevant information, and an oral hearing before the decision-maker, with the right to be represented by counsel, to call witnesses, to produce evidence, and to cross-examine. In other settings, however, procedural fairness may be satisfied by an informal and simple procedure that could never be mistaken for a trial, such as*

> *an opportunity to make submissions, or to have an interview with an official who will in turn report to the decision-maker.*
>
> *The contents of the procedural protections that an agency may be required to offer before taking administrative action should match in diversity the statutory powers to which the duty of fairness applies. In the absence of statutory rules, the task of prescribing for a particular agency a procedure that gives individuals who may be affected by its decisions a fair opportunity to participate in the decision making process, and at the same time is consistent with the public interest in effective, expeditious and efficient decision making, is among the most regularly encountered and difficult issues in the law of administrative procedure.*[32]

Many statutes are silent with respect to procedural fairness requirements. Other statutes specify very minimal protections. For example, the *Elevating Devices Safety Act* (section 25(2)) and the *Electrical Safety Act* (section 23(3)) provide that "unless the parties to an appeal agree otherwise, the board[33] must hear an appeal by holding a hearing at which all parties are entitled to be heard".

Some other statutes contemplate more formal proceedings with the full panoply of procedural protections. For example, the *Environment Management Act* (section 11(13)) requires the Environmental Appeal Board to give those persons with "full party status" the rights to be represented by counsel, to present evidence, to "ask questions" (in oral hearings) and to "make submissions as to facts, law and jurisdiction". Similarly, the *Coroners Act* contains provisions respecting the examination of witnesses (section 34), questions by the jury (section 35), the right to call evidence and cross examine (section 36), and the right of witnesses to counsel (section 40). The *Human Rights Code* requires the Human Rights Tribunal to give the parties before it "the opportunity to be represented by counsel, to present relevant evidence, to cross examine witnesses and to make submissions" (section 35(2)). Finally, the *Expropriation Act*, while silent in respect of most other procedural matters, expressly requires the Expropriation Compensation Board to "give written reasons for its decision" (section 26(2)).

While the common law identifies general principles for determining the content of natural justice and procedural rules in a given case, it is clear that the precise requirements will always be open to some (often considerable) debate. Accordingly, clearly articulated basic procedural requirements and rules will contribute significantly to reducing uncertainty in the law and

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[32] Brown and Evans, *Judicial Review of Administrative Action in Canada*, Volume 2 (Canvasback Publishing) at pp. 7-1 to 7-2.

demystifying the administrative tribunal's process for those appearing before it. In appropriate cases, the tribunal's "core" or minimum procedural fairness requirements should be expressed in its enabling statute. However, most of the information about the tribunal's procedures should be contained its detailed rules of practice and procedure.

Common law principles of natural justice and fairness may be abrogated by statute (within constitutional limitations). Abrogation of common law fairness requirements must be clearly spelled out in the administrative tribunal's enabling statute. In some circumstances there may be public policy reasons to remove certain procedural fairness rights (in the least intrusive fashion possible) by express statutory provision. An example of this would be where serious and impending public health or safety issues arise.

The *Community Care Facility Act* illustrates this point. In very general terms, this legislation regulates the licensing of child care and adult residential care facilities (collectively called community care facilities). The recipients of child care and adult residential care services represent a particularly vulnerable and reliant population. Where the director has reasonable grounds to believe that the health or safety of such persons is at risk, she has a discretion (under section 7 of the Act), without notice or a hearing, to attach terms or conditions to, or suspend, a licence or interim permit issued under the Act pending commencement or completion of a hearing under section 6 of the Act. Where this occurs, the director must commence the section 6 hearing as soon as is practicable (if a hearing is not already in progress).

In other cases, for reasons of institutional efficiency, the statutory abrogation of common law fairness principles may be seen to be necessary. For example, institutional bias concerns arise if a tribunal exercises several different functions such as investigative, "prosecutorial" and adjudicative. Clear and express statutory authority is required to permit an administrative tribunal to exercise overlapping functions. If such authority is expressly granted (and absent constitutional considerations), the tribunal should only be vulnerable to institutional bias allegations if it exercises overlapping functions unnecessarily. An example of where express statutory provision is made to guard against such unnecessary overlap is found in section 5.3(4) of the Ontario *Statutory Powers Procedure Act*. It provides that a tribunal member "who presides at a pre-hearing conference at which the parties attempt to settle issues shall not preside at the hearing of the proceeding unless the parties consent".

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[33] The board refers to the Elevating Device Safety Appeal Board in the case of the *Elevating Devices*

Although aimed at apprehended rather than institutional bias concerns, section 16 of the *Coroners Act* illustrates a provision intended to guard against perceptions of bias and conflict of interest in the decision maker. It sets out the specific circumstances in which a coroner will be disqualified from conducting an inquiry, inquest or investigation. In a similar vein, section 31(5) of the *Assessment Act* requires a property assessment review panel member to "faithfully, honestly and impartially perform his or her duties and must not, except in the proper performance of those duties, disclose to any person any information obtained as a member".[34]

It might be helpful to make provision respecting applications requesting the removal of a tribunal member (often referred to as recusal) as the adjudicator for reasons of apprehended bias. For example, in Quebec, the *Act Respecting Administrative Justice* requires such applications to be made to the chair of the tribunal "at any time before the decision" if brought "with dispatch" and if there is "good reason to believe that a cause for recusation exists". Such applications are determined by a three person panel of the tribunal, one of whom is the chair.

RULES OF PRACTICE AND PROCEDURE

Some administrative tribunals have an express statutory rule-making power in their enabling statute. As noted, the Labour Relations Board is one such tribunal and it reports that such a statutory rule-making power has greatly assisted it in its fair, efficient and effective functioning. The Labour Relations Board's rule-making power is as follows:

> 126(1) The board must determine its own practice and procedure, but must give full opportunity to the parties to a proceeding to present evidence and make submissions.
>
> (2) The board, subject to the minister's approval, may make rules governing its practice and procedure and the exercise of its powers and establish forms it considers advisable.

The Labour Relations Board's rules include general rules, rules relating to specific applications, strike and lockout votes and applications to the associate chair of the mediation division. These rules canvass a broad range of procedural matters, including filing of applications, service and delivery, consolidations, pre-hearing and settlement conferences, adjournments and withdrawals, decisions and non-compliance by a party.

Safety Act, and the Electrical Safety Appeal Board in the case of the *Electrical Safety Act*.

[34] Section 43(8) of the *Assessment Act* is a parallel provision that applies to the Property Assessment Appeal Board.

In addition to its rule-making powers, the Labour Relations Board has the power to make guidelines:

> 132(1) The board may formulate general guidelines to further the operation of this Code but the board is not bound by those guidelines in the exercise of its powers or the performance of its duties.
>
> (2) In formulating general guidelines the board may request that submissions be made to it by any person.
>
> (3) The board must make available in writing for publication all general guidelines formulated under this section, and their amendments and revisions.

The Employment Standards Tribunal has a statutory power to make rules "about how appeals and reconsiderations are to be conducted and about the steps to be followed before making recommendations". Like the Labour Relations Board, the Employment Standards Tribunal's rules are subject to ministerial approval (*Employment Standards Act*, section 109(c)).

The Expropriation Compensation Board has the power "subject to the approval of the Lieutenant Governor in Council, [to] prescribe rules, consistent with this Act, that govern the board's practice and procedure and the exercise of its powers" (section 27(1)). Thus the Expropriation Compensation Board's rules of practice and procedure, once approved, are spelled out in Regulations to the *Expropriation Act* (B.C. Reg. 452/87, O.C. 2530/87). Among other things, the regulations setting out the Expropriation Compensation Board's rules deal with its powers to extend or abridge time limits, grant adjournments, admit expert evidence and issue practice directives. These regulations also contain the following provision:

> ***Pre-hearing matters***
>
> 12 The rules of court relating to
>
> (a) discovery and inspection of documents,
>
> (b) examination for discovery,
>
> (c) pre-trial examination of witnesses, and
>
> (d) discovery by interrogatories,
>
> (e) apply to proceedings before the board.

Tribunals such as the Public Service Appeal Board, the Health Care and Care Facility Review Board, the Mental Health Review Panel and the Parole Board do not have any statutory rule-making powers. The procedures applicable to hearings before these tribunals are provided for in regulations (i.e., the Public Service Appeal Regulations, B.C. Reg. 133/94, O.C. 554/94, the

Health Care Consent Regulations, B.C. Reg. 20/2000, O.C. 89/2000), the Mental Health Act Regulations and the Parole Act Regulation, B.C. Reg. 61/93, O.C. 195/93).[35]

An example of an administrative tribunal with statutory rule-making powers that are not subject to any external approval mechanism is the Human Rights Tribunal. While the Labour Relations Board's enabling statute gives it a broadly expressed rule-making power, the Human Rights Tribunal's statutory power is expressed in inclusive terms but is more specific in its description of the types of rules it may make. Section 35 of the Code provides in part:

> ***Hearings***
>
> 35(1) Subject to the Code and the regulations, the tribunal may make rules respecting the practice and procedure for the conduct of pre-hearing matters and hearing the tribunal considers necessary to facilitate just and timely resolution of complaints.
>
> (1.1) Without limiting subsection (1), the tribunal may make rules as follows:
>
> (a) requiring the parties to attend a pre-hearing conference in order to discuss issues relating to a complaint and the possibility of simplifying or disposing of issues;
>
> (b) respecting the disclosure of evidence, including but not limited to pre-hearing disclosure and pre-hearing examination of a party on oath or solemn affirmation or by affidavit;
>
> (c) specifying the form of notice to be given to a party or by the tribunal requiring a party to diligently pursue a complaint and the time within which and the manner in which the party must respond to the notice;
>
> (d) respecting service of notices and orders, including substituted service;
>
> (e) requiring a party to provide an address for service or delivery of notices and orders;
>
> (f) providing that a party's address of record is to be treated as an address for service.

Relying on this more particularized type of rule-making power, the Human Rights Tribunal has, following wide consultation with interested groups, developed comprehensive rules of practice and procedure (the Human Rights Tribunal Rules) to facilitate "the just and timely resolution of complaints". Like the Labour Relations Board Rules, the Human Rights Tribunal Rules deal with a broad range of procedural matters and include provisions specifically tailored to address unique aspects of the Human Rights Tribunal's mandate and responsibilities.

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[35] Where the tribunal does not have a statutory rule-making power and where, despite a regulation-making power dealing with practice and procedure, no regulations have been passed, the tribunal will rely on the common law "master of its own procedures" principle to establish practice and procedure rules.

Other examples of administrative tribunals with broad rule-making powers that are not subject to any external approval mechanism include the Property Assessment Review Board (*Assessment Act*, section 38(7)(a) "[the review panel chair may] determine the procedures to be followed at proceedings of the review panel"), the Property Assessment Appeal Board (*Assessment Act*, section 46(1) "[t]he board may make rules of practice and procedure, consistent with this Act and the regulations, for conducting proceedings before it"),[36] and the Medical and Health Care Services Appeal Board (*Medicare Protection Act*, section 44, power to make "rules governing practice and procedure for all appeals before the board").

As the above examples illustrate, some administrative tribunals' express rule-making functions are not subject to any external approval mechanism. In other cases, the rule-making function is subject to either ministerial or Cabinet approval. In yet other cases, the administrative tribunal has no statutory rule-making function but is subject to regulations detailing its hearing procedures. In these cases, the function of establishing appropriate practices and procedures is given to Cabinet. Additionally, in some cases, tribunals' rule-making power is expressed in very general terms while, in other cases, the types of rules tribunals can make are specifically enumerated in an inclusive fashion.

It is not clear why some tribunals are given a statutory rule-making power while other tribunals are not. Similarly, where statutory rule-making powers are contained in a tribunal's statute, it is not clear why ministerial (or even Cabinet) approval is required in some cases, but not in others. It is also unclear why some rules have the force of regulations and others do not.

Power to Make Rules About Practice and Procedure

It is recommended that, as a general rule, administrative tribunals be given the power to make their own rules of practice and procedure. The specific enumeration of broad statutory powers that may be procedural in nature serves to establish beyond doubt which administrative tribunals have such powers. Through the rule-making function, administrative tribunals can develop the details of the exercise of those powers and tailor their rules to suit their unique needs and responsibilities.

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[36] While the Property Assessment Appeal Board has been given broad rule-making powers, many of its procedures are highly detailed in its enabling statute. For example, section 50(4) details what must be contained in a notice of appeal.

Power to Issue Practice Directives

In addition to having a statutory rule-making power, administrative tribunals should be given the power to issue practice directives. This power might, in appropriate cases, circumscribe what subjects a tribunal must be address. For example, the statutory power might be general with a specific requirement that the tribunal issue a practice directive respecting the timeframes for its decision making. For illustrative purposes, the directive might indicate that the tribunal's decisions will be released within 60 days of the conclusion of the hearing.

Such a practice directive would create greater certainty for the parties in understanding when to expect a decision. It would also overcome the problems associated with a tribunal's failure to comply with a statutory timeline for decision making and dispense with the need to litigate about whether the tribunal's statutory duty to release its decision within the statutory deadline is mandatory or permissive. While the practice directive would not have statutory force, it would place some pressure on the tribunal to keep within the general time estimate contained in the directive.

Ministerial Approval Requirement

Consideration must be given to the question of whether administrative tribunals should have complete rule-making autonomy or whether their rule-making powers should be subject to an external approval or review process, such as ministerial or Cabinet approval. Such an external check would be aimed at ensuring that the tribunal's rules are consistent with its statutory mandate and powers and consistent in expression, to the extent possible, with the rules of tribunals with similar rules of practice and procedure. David Mullan has made the point that an external review mechanism (like the former Ontario Statutory Powers Procedure Rules Committee) is "important in ensuring that agency self-interest does not impede the development of procedures that are responsive to constituency needs and the even-handed dispensing of administrative justice".[37]

Many advocate an external review mechanism (like the English Council on Tribunals) that is independent of both government and tribunals. Other approaches include tribunal rule-making autonomy (as in Ontario) and ministerial approval. In Quebec, tribunals receive advice from the

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[37] See the background paper, The Statutory Powers and Procedures of Administrative Tribunals in British Columbia, p. 60.

Administrative Justice Council in respect of the exercise of their rule-making powers. As summarized in the background paper:

> *... one's preference for a particular implementation strategy depends very much on one's assessment of who would do the best job in establishing truly credible and functional rules for individual tribunals. Some may argue that wherever rule-making is involved, governments should always be the final decision-maker because rules are "legislative" in nature. Others would argue that governments do not know enough about individual tribunals, and may have a self-interest in establishing rules that suit their ministries (who are often parties) rather than the larger public interest. Some persons objecting to rule-making by government may argue that tribunal members know their boards best and that they should have exclusive rule-making authority. Others argue that agencies are subject to their own types of narrow interests, and that the appropriate safeguard can only come with participation [of] an outside body such as a rules committee.*

It is recommended that the power to enable administrative tribunals to establish their own rules of practice and procedure be subject to ministerial approval. This would ensure an appropriate balance between tribunal input into its rules and ministerial accountability. The role of the advisory body in respect of tribunal rules (discussed below) should counteract concerns about potential ministry "self-interest" through establishment of rules to suit ministry needs.

Where it is reasonable and sensible to do so, an administrative tribunal should also solicit input into its rules from those parties that routinely appear before it as, for example, the Labour Relations Board and Human Rights Tribunal have done.

Statutory Powers and Procedures – Advisory Body

The diversity between administrative tribunals – their differing roles and mandates – means that statutory powers appropriate to one tribunal would not be necessary or even appropriate for another. For example, administrative tribunals that adjudicate disputes between parties will require more traditional court-like "trial" procedures than those which perform a purely appellate function. Similarly, administrative tribunals required to make decisions within tight time constraints would not require many of the case management tools that are critical to other types of adjudication. It is therefore proposed that policy guidelines be established, setting out the types of considerations relevant to determining the types of statutory powers appropriately given to a tribunal.

Such guidelines could be developed as part of a Model Statutory Power Provisions for Administrative Tribunals policy document. The work could be led by a special advisory body in the Ministry of Attorney General (as described earlier in this report), in conjunction with the Office of Legislative Counsel. The advisory body would also be responsible for establishing model rules of practice and procedure, drawing from existing model rules, such as the Ontario Rules developed by the Society of Ontario Adjudicators and Regulars (SOAR) and the Model Rules of Procedure for Tribunals established by the English Council on Tribunals.

Additionally, as discussed below, the advisory body would have a key role in developing administrative justice plans for individual administrative tribunals and in making recommendations to the Attorney General with respect to appropriate legislative powers and procedural reforms.

ADMINISTRATIVE JUSTICE PLANS

Individual administrative tribunals are in a good position to assess and identify the tools that suit their individual practice and procedure needs. Each tribunal should therefore be given the opportunity to identify and justify the specific powers it sees as necessary to its efficient functioning. The vehicle for such a task would be an administrative justice plan for each tribunal.

This idea was advanced but not fully developed by BCCAT in its submissions to the Project. The administrative justice plan envisaged here would provide detailed comment on tribunal operations and activities and an opportunity for each tribunal to propose the inclusion of selected statutory powers in its enabling statute. For tribunals that either have or propose to have broad rule-making powers, administrative justice plans would also include their existing or proposed rules of practice and procedure – along with a description of the efforts made to use model provisions. If uniformity is not practical or appropriate for particular tribunals, then their administrative justice plans should indicate why this is so.

The plans would be developed by each tribunal chair with the assistance of the advisory body and the host ministry, guided by the Model Statutory Power Provisions for Administrative Tribunals document. The tribunal chair would be required to advance a solid policy justification for any proposed powers or proposed amendments to existing powers.

Public Access to Information about Administrative Tribunal Statutory Powers, Procedures, Directives and Decisions

Access to administrative justice is an essential feature of reform initiatives. The public should have easy access to information about a tribunal's enabling statute, its rules of practice and procedure and its practice directives.

Some statutes require tribunals to publish their decisions or make their orders and decisions open for public inspection. This is the case for the Property Assessment Appeal Board, for example. In many other cases, the enabling statute is silent on the point. Regardless, many tribunals have ensured public access to the greatest extent possible through, for example, the publication and distribution of the rules and directives to interested groups and parties and their inclusion on tribunal websites. In other cases, the process or means for obtaining such information is unclear.

Administrative justice plans should identify how the public can access its enabling statute, its rules of practice and procedure, its practice directives and its decisions. Consideration should also be given to whether a central repository for, or links to, tribunal statutes, rules, directives and decisions should be available through the Ministry of Attorney General on an administrative justice website.

THE ROLE OF THE ATTORNEY GENERAL

It is anticipated that, as a result of the tribunal-by-tribunal review and the development of administrative justice plans, legislative amendments to the enabling statutes of most administrative tribunals will be necessary. Additionally, in some cases, regulations detailing tribunal procedures will need to be repealed.

Proposals for legislative amendment to tribunals' enabling statutes are ultimately the responsibility of host ministries. A central review mechanism should nevertheless be established to ensure the greatest degree of consistency possible in tribunal powers and procedures. Such review would also ensure that the proposed powers in a tribunal's administrative justice plan are necessary and appropriate to its mandate and responsibilities. Without a form of central agency review, consistent application of underlying policy rationales cannot be achieved. Similarly, without a form of central agency review of existing or proposed rules of practice and procedure,

there will be no ready means for ensuring, to the greatest extent possible, tribunal-by-tribunal consistency in applicable procedures.

It is proposed that an appropriate "external" check on the proposals set out in the administrative justice plans would consist of the "sign off" of the plan by the Attorney General. In many cases, the Attorney General may not be the minister responsible for the tribunal's constituent legislation and thus will not have final "approval" of any proposed request for legislation. However, Attorney General 'sign off" would signal to the sponsoring minister that the Attorney General is satisfied that the amendments sought are consistent with the goals underlying the Project. The advisory committee would be responsible for making recommendations to the Attorney General as to whether such "sign off" is appropriate.

While the advisory body would not have formal oversight of the approval of tribunal rules, it would strive for greater uniformity in the types of procedures employed by tribunals and in the language used to describe them. It is recommended that a "sign-off" process similar to that proposed for statutory powers be implemented whereby the advisory body would make recommendations to the Attorney General about whether to "sign off" or approve a tribunal's rules of practice and procedure.

SPECIAL CONSIDERATIONS

There are some types of administrative tribunals where statutory reform may not be either appropriate or possible. For example, the Criminal Code Review Board is established under the Mental Disorder Provisions (Part XX.1) of the *Criminal Code* and is responsible for making or reviewing dispositions concerning accused persons who have been found either unfit to stand trial or not guilty by reason of a mental disorder. The constitution and powers of the review board are extensively spelled out in sections 672.38 to 672.43, 672.1, 672.5 and 672.83 of the *Criminal Code*. As the Criminal Code Review Board is created by and given powers under federal legislation, its powers and composition can only be altered by federal legislation.

However, section 672.44 of the *Criminal Code* provides:

> 672.44(1) A Review Board may, subject to the approval of the lieutenant governor in council of the province, make rules providing for the practice and procedure before the Review Board.

> (2) The rules made by a Review Board under subsection (1) apply to any proceeding within its jurisdiction, and shall be published in the Canada Gazette.
>
> (3) Notwithstanding anything in this section, the Governor in Council may make regulations to provide for the practice and procedure before Review Boards, in particular to make rules of Review Boards uniform, and all regulations made under this subsection prevail over any rules made under subsection (1).

As section 672.44(1) illustrates, the federal legislation allows the Criminal Code Review Board to make rules providing for its practice and procedure subject to Cabinet approval. Any such rules can be superceded by any uniform federal rules established under section 672.44(3).

An example of where statutory reform of the nature considered in this report is likely inappropriate concerns the Securities Commission and its principal statute, the *Securities Act*.

Although the securities markets in Canada are now essentially national in scope and operation, the field of securities legislation has been historically occupied by provincial securities legislation, relying on the provincial constitutional "property and civil rights" head of power.[38] While Parliament may have constitutional authority to regulate the securities industry federally,[39] it has so far declined to do so.[40] One likely explanation is that proposals for a national regulatory model have never garnered the confidence of all the regulators and their governments.

Because of disparities between the various provincial securities statutes, the overall regulatory framework has been described as "fragmented" and "unwieldy from a national perspective".[41] To address these concerns, Canadian securities regulators have taken various steps to advance a *de facto* harmonized Canadian regime, including the establishment of the Canadian Securities Administrators[42] and the adoption of inter-provincial mutual recognition and reciprocal assistance

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38 The three territories also have securities legislation.

39 Most likely under the "trade and commerce" or "peace, order and good government" federal constitutional head of power.

40 Exceptions have been legislation governing the corporate attributes of federal corporations and criminal laws concerning certain aspects of the securities markets.

41 See, for example, David Johnston and Kathleen Doyle Rockwell, Canadian Securities Regulation, 2nd ed. (Butterworths 1998) at pp. 7-9 where the authors write that "[a]lthough this system is relatively effective in each province, it is unwieldy when viewed nationally. A person wishing to conduct business (issuing, investing, advising, counseling) in more than one province must be familiar with the structures and personalities in each province. A securities lawyer attempting to clear a prospectus in more than one province must deal with several commissions".

42 The 13 Canadian securities regulators work closely together under the umbrella organization of the Canadian Securities Administrators to ensure the national markets are regulated fairly, efficiently and

models. More recently, in October 2001, the Canadian Securities Administrators agreed to develop uniform securities legislation and rules to be enacted in identical form throughout Canada. The target date for proclamation of such uniform legislation and rules is March 31, 2004.

It is envisaged that this uniform legislation will authorize each provincial regulator to delegate powers to regulators in other jurisdictions and to accept delegated powers from other regulators. Such delegation will encompass powers to hold administrative hearings and make enforcement orders on a multi-jurisdictional basis. Such a system of delegated decision making across regulatory jurisdictions will require uniform administrative powers and procedures.

In light of these developments, it is important to ensure that provincial administrative justice reform initiatives are sensitive to the unique circumstances of the Securities Commission. It may well be appropriate to exempt the commission altogether from the reform initiatives proposed in this paper.

CONCLUSION AND RECOMMENDATIONS

As noted at the outset, it is recognized that the diversity of administrative tribunals precludes uniform treatment. To be effective, powers and procedures must be specifically and carefully tailored to suit each tribunal's statutory mandate and responsibilities. However, it is apparent that there are many points of commonality between tribunals and many opportunities to express the same types of powers and procedures in the same way.

It is hoped that the recommendations set out in this report will generate considerable comment and debate to ensure that the steps ultimately taken will best serve the interests of the public, the parties to administrative tribunal proceedings and the tribunals themselves. While reform of this nature may appear daunting, it is necessary to ensure an efficient, effective and accessible administrative justice system – and to ensure the greatest possible uniformity and consistency across tribunal powers and procedures.

in the public interest. A significant focus of this organization's work relates to harmonizing legislation, developing uniform rules and guidelines and reducing duplication through a mutual reliance system (where the principal jurisdiction works on an application or project and other jurisdictions rely on that work in making their decisions). It includes the development of national electronic filing systems through which one regulatory filing can be made and processed for all jurisdictions.

Recommendations

It is the responsibility of government to provide administrative tribunals with the statutory tools they need to make their processes more accessible and transparent. In striking an appropriate balance between flexibility at the individual tribunal level and consistency across administrative tribunals, it is recommended that government adopt a principled approach to legislative decisions about what powers are appropriately granted to a tribunal and how such powers are described. To achieve these objectives and ensure both procedural fairness and effective tribunal administration, it is recommended that government:

Develop a policy document, Model Statutory Powers Provisions for Administrative Tribunals, setting out a comprehensive "menu" of statutory powers that can be selectively applied (with any necessary adjustments) to individual administrative tribunals. It will include alternative provisions in respect of some powers and guidelines governing the application of all tribunal powers. The statutory powers appropriate to each administrative tribunal will be determined by a tribunal-by-tribunal review. As a general rule, administrative tribunals will be given the power to establish rules of practice and procedure (subject to ministerial approval) and to issue practice directives.

Establish a special advisory body within the Ministry of Attorney General that includes representatives of the Office of Legislative Counsel, the Administrative Justice Office, host ministries and the Dispute Resolution Office, with access to administrative law and policy experts in the Ministry of Attorney General. The advisory body will be responsible for developing the Model Statutory Powers Provisions for Administrative Tribunals policy document and guidelines, developing uniform rules of practice and procedure, assisting individual tribunals in the development of administrative justice plans and rules and making recommendations to the Attorney General about legislative reform.

Require administrative tribunals to develop administrative justice plans identifying and justifying the statutory powers each tribunal sees as being essential to its efficient functioning, having regard to the policy document and guidelines established by the advisory body. These plans will include existing or proposed rules of practice and procedure.

Establish a central review mechanism to ensure consistency in tribunal powers and procedures. This review mechanism will consist of a "sign off" of tribunal administrative justice plans and proposed rules of practice and procedure by the Attorney General. The advisory body will be responsible for making recommendations to the Attorney General as to whether this "sign off" is appropriate.

STANDING TO APPEAR BEFORE ADMINISTRATIVE TRIBUNALS

Report and Recommendations

Prepared by

Administrative Justice Project

for the

Attorney General of British Columbia

July 2002

FOREWORD

The following report was prepared for British Columbia's Administrative Justice Project. Established in July 2001, the Project is part of the government's commitment to ensure that the administrative justice system is accessible, efficient, fair and affordable – and that it continues to provide a less formal, complex and costly alternative to the courts.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. It has also set forth a series of recommendations to address the most significant challenges facing the system today.

This report discusses issues related to standing – specifically, the decision making process that determines who may appear before administrative tribunals, and under what circumstances. The term "standing" is used to define who may participate in a proceeding before a court or a tribunal, either as a party or as an intervenor. The doctrine of standing performs an important gate-keeper function in defining the degree of interest required to entitle a party to participate in a legal proceeding. The question of standing to appear before administrative tribunals is largely dependent on statutory language. It is important that statutory standing provisions are framed with sufficient clarity to identify those entitled to appear before tribunals and avoid unnecessary disputes over the scope of participatory entitlements.

The analysis and recommendations presented here support the Administrative Justice Project's White Paper. Copies of the White Paper, other background papers, reports and further information on the project are available through the Internet at: www.gov.bc.ca/ajp.

Interested readers are invited to provide comments on the White Paper and related reports before November 15, 2002 by:

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Table of Contents

Introduction 1
Common Law Standing Rules 2
Standing to Sue 3
Intervention 4
Standing to Appear Before Administrative Tribunals 6
Standing to Appeal/Initiate Proceedings 6
Tribunal Power to Add Parties/Intervenors 10
Standing of Statutory Decision Maker 12
Summary of Recommendations 15
Appendix A 16
Appendix B 17

INTRODUCTION

The law of standing is concerned with the important threshold question of a party's entitlement to seek judicial relief. The focus of standing principles is on a party's status and the degree of his or her interest in the litigation or other decision-making process. Through interest-based standing tests, the common law has sought to distinguish those with a true interest in the subject matter of the proceeding from "mere busybodies". Where a party's interest does not meet the requisite threshold, he or she is said to lack standing to proceed. In this way, the law of standing performs an important gate-keeping function, preserving scarce judicial resources and setting appropriate boundaries on the limits of judicial discretion.

Common law standing rules have been much discussed and debated, particularly in recent years with the rise of "public interest" standing rules that have expanded the range of parties afforded access to the courts. The issue of standing to appear before administrative tribunals has been subject to less scrutiny. To some extent, this lack of attention is understandable. The question of who has standing to initiate proceedings before a statutory decision maker is highly contextual and almost exclusively dependent on statutory language. At the same time, issues of standing to appear before tribunals are arising with increasing frequency, partly in response to the expansion of the requirements of procedural fairness. In this sense, issues of standing before administrative tribunals overlap with the broader need for clearly defined statutory powers and procedures.

In an administrative law context, standing rules reflect a certain tension between the goal of access to the justice system and the goals of efficiency, clarity and certainty in the decision making process. The law of standing strikes a balance between the need to ensure adequate rights of participation for persons affected by administrative decisions and the need to decide disputes efficiently within the boundaries of statutory purpose.

In providing an alternative to the courts, administrative tribunals are expected to operate on a more informal basis, providing decision-making processes that are efficient, transparent and fair. The recommendations in this report are intended to promote those goals by streamlining administrative proceedings, ensuring fair treatment of persons affected by administrative decision making and eliminating unnecessary complexity in tribunal processes.[1] These objectives suggest that legislative standing rules should be guided by the following principles:

- Standing provisions should ensure fairness and openness in administrative proceedings, without undermining statutory objectives.
- Standing provisions should promote the efficient and timely resolution of disputes within statutory boundaries.
- Standing rules should be open and transparent so that parties affected by an administrative process understand the basis on which they are entitled to participate.
- There should be consistency between tribunals in formulating standing rules, unless there is a rational basis for inconsistency.

The varied and diverse nature of tribunals in British Columbia makes it both impossible and undesirable to formulate uniform standing provisions to resolve all issues of status before a statutory decision maker. At the same time, the current degree of legislative diversity in the area of standing cannot be entirely explained on the basis that different statutory contexts require different approaches. It is possible to identify certain common principles that underlie standing rules, both under statute and at common law, and to apply those principles in a manner that achieves greater uniformity and clarity without undermining the need for a contextual approach.

COMMON LAW STANDING RULES

As noted above, issues of standing have been discussed and debated at length in the context of the common law. Some of the substance of those discussions is summarized below, as a useful

[1] Administrative Justice Project, Terms of Reference, July 27, 2001. Available online at: http://www.gov.bc.ca/ajp.

point of comparison for shaping standing policies in the context of the administrative justice system.

Broadly speaking, the question of standing before the courts is resolved through the application of common law tests encompassing two concepts: (1) standing to sue and (2) standing to intervene. Standing to sue connotes a party's status to initiate and maintain an action in his or her own right. In contrast, intervention is a procedural device which entitles an individual to participate in an existing proceeding.[2]

Standing to Sue

The doctrine of standing, both at common law and under statute, can be understood in light of underlying policy rationales. Three primary justifications have been offered for the common law restrictions on a party's entitlement to seek judicial relief.[3]

1. **Preservation of scarce judicial resources.**

   This is the most commonly-cited rationale for the common law requirement of standing. Interest-based standing tests serve the goal of efficiency by preventing courts from being overrun by a multiplicity of law suits at the behest of parties with only a marginal interest in the subject matter of the proceeding.

2. **Standing as a function of an adversarial system.**

   Standing rules ensure that issues are decided in the context of concrete factual disputes, fully argued by those parties most directly affected. Where the dispute relates to the contested rights of the parties themselves, this "sharpens the presentation" of the issues to be decided.

3. **Establishing limits on judicial discretion.**

   Finally, standing rules also help define the appropriate role of the court in resolving issues of public importance. In preventing the consideration of legal issues that are not properly before the court, standing rules assist in establishing appropriate boundaries on judicial discretion.

While standing to sue is always a prerequisite to obtaining judicial relief, in most private law cases the issue of standing is uncontroversial. A party to a contract has a clear right to seek a legal remedy in the event that the contract was breached and an individual who is injured through the

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2 Paul R. Muldoon, *The Law of Intervention* (Aurora, 1989), p. 11.

3 Thomas A. Cromwell, *Locus Standi, A Commentary on the Law of Standing in Canada* (Toronto, 1986), pp. 9-11.

fault of another can claim compensation in a personal injury action. In these circumstances, the injured party's "standing" to maintain an action is unquestioned. The issue of standing becomes more difficult where a private litigant seeks access to the courts to remedy the infringement of a public right. In these cases, common law standing tests determine a party's interest in the proceeding.

Recently, the limits on a litigant's ability to seek remedies for the infringement of a public right have been relaxed through a series of court decisions establishing a judicial discretion to grant "public interest standing". Under these principles, a private party may be granted standing to enforce a public right where:

- a serious issue is raised;
- the applicant has a genuine interest;
- there is no other reasonable and effective means to bring the issue to court.

The purpose of granting status in these circumstances is to prevent the immunization of unlawful legislation or administrative action from judicial review. In exercising the discretion to grant standing to sue to public interest groups, courts must strike a balance between ensuring access to the courts and preserving judicial resources.[4]

Intervention

The concept of intervention is an important but distinct component of the common law of standing. Unlike standing to sue, which is directed towards an individual's entitlement to initiate and maintain an action, intervention is a device that allows "strangers" to a judicial proceeding to participate in that proceeding.

While standing to sue and intervention are related concepts (both are concerned with the broad issue of status before the courts), there are important distinctions in terms of the underlying policy goals and how those goals are achieved. Four primary justifications have been identified for the court's power to grant intervention.

1. **Efficient administration of justice.**

   As with standing to sue, the prime policy rationale offered in support of intervention is that of ensuring the efficient use of judicial resources. In the context of intervention, efficiency

[4] *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675.

may require an expansive view of participation, channeling disputes into one action to avoid a multiplicity of lawsuits.

2. **Protection of absent persons' interests.**

   Intervention prevents a miscarriage of justice by permitting those who stand to be affected by a judicial decision to participate in the proceeding.

3. **A better informed court.**

   Intervenors may allow the court to become better informed about all aspects of a decision and its potential impact on those who are not parties to the proceeding. This is of particular importance in public interest cases.

4. **The court's decision is legitimized.**

   Providing those affected with an opportunity to be heard not only meets basic notions of fairness and justice, it also legitimizes the court's final decision.

In British Columbia, both the Supreme Court and the Court of Appeal have the ability to hear from intervenors in appropriate circumstances.[5] In each case, the court must consider the proposed intervenor's degree of interest in the matter and the likelihood that the intervenor will make a useful contribution to the proceeding without injustice to the original parties. The following guiding criteria have been identified:

- the nature of the group seeking intervention;
- the directness of the group's interest in the matter;
- the suitability of the issue in the case at bar.[6]

Ultimately, the granting of standing to intervene is a matter of judicial discretion. The two predominant considerations that militate against intervention are undue delay and prejudice to the parties. The other considerations include whether:

- intervention will widen the litigation between the parties;
- the interests of the applicant are already adequately represented;

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5 Section 36 of the newly-released *Court of Appeal Rules* authorizes "any person interested" to apply for leave to intervene before the Court of Appeal. Trial courts in British Columbia have the inherent jurisdiction to permit intervention. In addition, Rule 15(5)(a)(ii) of the *Supreme Court Rules* permits the joinder of parties at trial where the party has a direct interest in the outcome of the litigation. The distinction between this authority to add parties and the Court's inherent jurisdiction to appoint intervenors is addressed in *Canadian Labour Congress v. Bhindi et al.* (1985), 61 B.C.L.R. 85 (C.A.).

6 *Guadagni v. W.C.B. and B.C. Federation of Labour* (1988), 30 B.C.L.R. (2d) 249 (C.A.); *Canadian Labour Congress v. Bhindi et al.*, *supra*; *MacMillan Bloedel Ltd. v. Mullin et al.*, [1985] 3 W.W.R. 380 (B.C.C.A.).

- intervention will open the "floodgates" to further intervention;
- intervention will transfer the court into a political forum.[7]

Intervention is more commonly granted in cases that raise public law issues where the court's final decision can be expected to have broad impact beyond the particular interests of the parties to the proceeding.

The degree of participatory rights to be enjoyed by an intervenor is within the discretion of the court.

STANDING TO APPEAR BEFORE ADMINISTRATIVE TRIBUNALS

Although the previous points regarding the common law are relevant, it is important to note that legal issues relating to party status before administrative tribunals encompass different concepts. In a substantive sense, the law of standing is concerned with who has status to bring an appeal or review or otherwise invoke the process of a tribunal. Standing in this sense is roughly analogous to the "standing to sue" concept at common law. Intervention is also important in the administrative tribunal context, particularly in answering the question of who, as a matter of procedural fairness, should be entitled to participate in proceedings before a tribunal. Finally, the issue of standing has arisen in a unique sense for tribunals in terms of the status of decision makers to appear on a statutory appeal or judicial review of their own decisions.

Standing to Appeal/Initiate Proceedings

Many tribunals exist as a forum for resolving disputes between private parties or between a private party and a public agency. For tribunals that perform adjudicative functions, the standing of a party to initiate proceedings is an important precondition to the tribunal's substantive jurisdiction. In a party-driven administrative process, the constituent statute will determine not only what types of disputes may be brought before a tribunal for resolution but also who can bring them.

For this reason, the question of standing to bring proceedings before an administrative tribunal is not, for the most part, resolved by the application of common law tests but rather through the

[7] Muldoon, *Law of Intervention*, at p. 89.

interpretation of legislative language. Provided that the legislation is sufficiently clear, the question of who has standing should, in theory, not arise. In practice, such unambiguous standing provisions are not always possible, particularly where a tribunal's statutory mandate includes consideration of the broader public interest. In these circumstances, legislative standing provisions are frequently left open to interpretation through the use of such general descriptions as "person aggrieved" or "person affected". While the meaning of this general language must be interpreted in its statutory context,[8] courts and tribunals are frequently unable to resist the urge to borrow from judicial decisions in interpreting the scope of such standing provisions often with inconsistent results.

It is clear that the tribunals falling within the scope of the mandate of the Administrative Justice Project perform a variety of functions in diverse statutory contexts. This makes it both impossible and undesirable to attempt to formulate a uniform standing provision of general application. In addressing the issue of statutory standing provisions, tribunals can be divided by their function into three broad categories:

- bodies that perform an adjudicative or administrative function in relation to issues or disputes that primarily concern individual rights or interests, for example, workplace tribunals and residential tenancy arbitrators;
- bodies that perform an adjudicative or administrative function in relation to issues or disputes that stand to impact a broader public constituency, for example, tribunals established to hear appeals from licensing or other regulatory bodies;
- bodies that perform an inquiry function, for example, commissions of inquiry.

Statutory standing provisions in the first category are typically unambiguous. For example, standing to appeal a determination of the Director of Employment Standards under the *Employment Standards Act* is granted only to the person served with the determination.[9] The right to appeal a finding of the Review Board under the *Workers Compensation Act* is limited to the worker, the worker's dependents and the employer.[10] Under the *Residential Tenancy Act*, only the landlord and tenant may apply for the appointment of a Residential Tenancy Arbitrator.[11]

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8 See for example, *B.C. Development Corp. v. Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447, discussing the meaning of "aggrieved" under the *Ombudsman Act*.

9 R.S.B.C. 1996, c.113, s. 112.

10 R.S.B.C. 1996, c.492, s. 91.

11 R.S.B.C. 1996, c.406, s. 49.

Where this type of explicit statutory definition of party status is provided, issues of standing to initiate tribunal proceedings rarely, if ever, arise.

At the other end of the spectrum, bodies that perform an inquiry function are not engaged in party/party dispute resolution. Inquiry bodies are established primarily for the purpose of fact finding and do not determine the rights of individual parties. In the course of conducting inquiries, these bodies typically (and necessarily) have broadly defined powers to hear from all interested parties.

Disputes over statutory standing most frequently arise in the middle category. Tribunals in this category are frequently left to resolve standing issues in the context of open-ended statutory standing provisions granting rights of appeal or rights of complaint to, for example, persons "affected" or "aggrieved" by statutory decisions.[12] There are difficulties with such provisions in terms of achieving the objectives of consistency in approach and transparency in tribunal processes.

First, there is a marked lack of consistency in terms of the statutory language used. Currently, there are provisions in British Columbia legislation that grant standing to:

- persons aggrieved;
- persons dissatisfied;
- persons aggrieved or dissatisfied;
- persons affected;
- persons directly affected;
- interested persons;
- any person, with leave of the tribunal.

The reason for such differences in terminology is not always clear from the statutory context.

At a more fundamental level, it must be recognized that such open-ended standing provisions create a measure of uncertainty by leaving standing issues to be resolved through an interpretive process, typically with little in the way of legislative guidance. Not only does this create uncertainty for the parties to the administrative process, the adjudication of these types of

[12] Examples of such legislative provisions are set out in Appendix A.

standing disputes has taken up a considerable amount of tribunal and court resources.[13]

Legislative reform in this area has to date proceeded on an ad hoc basis. For example, in 1997, the *Waste Management Act* was amended to provide standing to appeal to "a person aggrieved" rather than "a person who considers himself or herself aggrieved".[15] The *Liquor Control and Licensing Act* underwent a series of more specific amendments in which a broad "person aggrieved" standing provision was ultimately replaced with a provision that limited standing to statutorily defined parties.[16]

These examples of isolated legislative reform suggest that more, and more uniform, assistance could be provided to highlight the legislative intent underlying statutory standing provisions. In terms of the objectives of consistency and transparency, unambiguous standing provisions are preferable to those that leave the question of standing to the uncertainty of an interpretive process. While more general standing formulae may be necessary in some contexts, it is unclear why, for example, a statutory right of appeal from a decision to refuse or cancel a licence is available to "persons aggrieved" rather than limited to the licensee. Even where an open-ended standing provision is necessary because an administrative decision will affect a broader constituency, additional legislative guidance could be provided in the form of criteria to be considered in determining the issue of standing.[17]

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13 For example, *Howe Sound Pulp and Paper Ltd. v. British Columbia (Environmental Appeal Board)*, [1999] B.C.J. No. 978 (QL) (S.C.); *Metalux Products Ltd. v. Deputy Director of Waste Management*, Appeal No. 96/17(b) (E.A.B.); *Cook v. Environmental Health Officer*, Appeal No. 00-HEA-032(a) (E.A.B.); *Watson v. Registrar of Companies and Elizabeth Bagshaw Society*, Appeal No. CAC-9708 (C.A.C.); *Matcom Invt. Ltd. v. Gen. Manager, Liquor Control & Licensing Branch* (1987), 16 B.C.L.R. (2d) 335 (C.A.); *B.C. Chicken Marketing Board v. B.C. Marketing Board*, 2002 BCSC 610; *British Columbia (B.C. Marketing Board) v. British Columbia*, [1988] B.C.J. No. 595 (QL) (S.C.).

14 It is worthy of note that the courts themselves have at times expressed frustration at the frequency with which such ambiguous phrases as "person aggrieved" appear in statutes. In *Ealing Corporation v. Jones*, [1959] 1 Q.B. 384, the Court in construing the words "person aggrieved" voiced a "protest that Parliament continues to allow this expression to come into Act after Act of Parliament" (at p. 390).

15 *Waste Management Act*, R.S.B.C. 1996, c.482, s.44.

16 The evolution of the test for standing under the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c.267, is reviewed in *Jolly Coachman Neighbourhood Pub v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, [1998] B.C.L.I. No. 8 (QL) (Liquor Appeal Board), at para. 27.

17 For example, a statute could grant standing to "persons affected", but also contain a provision to following effect: "For the purposes of [the section granting the right of appeal], a "person affected" includes...".

Recommendations

In the context of tribunals engaged in party/party dispute resolution, provide, as far as possible, unambiguous statutory provisions setting out who is entitled to appeal, to file a complaint or to otherwise invoke the process of the tribunal.

Where open-ended standing provisions are necessary because tribunal decisions will affect a broad constituency, provide:

- **consistency in the language of such open-ended standing provisions;**
- **legislative guidance as to the types of interests that are intended to be captured by the standing provision.**

Tribunal Power to Add Parties/Intervenors

An important aspect of the question of standing is the power of tribunals to hear from interested parties in the course of an ongoing proceeding. Again, this is roughly analogous to the jurisdiction of the courts at common law to permit intervention in a proceeding and is premised on much the same underlying policy concerns. The power to permit intervention is an aspect of a tribunal's authority to control its own procedure. Only clearly expressed language in a tribunal's constituent statute can take away this authority and discretion.[18]

The principles of procedural fairness provide an important backdrop to the tribunal's power to hear from interested parties. The *audi alternam partem* (right to be heard) rule requires that parties directly and necessarily affected by a tribunal's decision be afforded a right of participation in the proceedings unless the governing statute expressly provides otherwise.[19] A tribunal's power to add parties and intervenors ensures adequate rights of participation for those affected and also assists the tribunal in providing a full picture of the rights and interests at stake. Since tribunals, unlike courts, do not have the inherent power to grant public interest standing,[20]

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18 *Re American Airlines Inc. and Competition Tribunal et al.* (1988), 54 D.L.R. (4th) 741 (Fed. C.A.); appeal dismissed [1989] 1 S.C.R. 236. In contrast, it may be that tribunals do not have the power to add parties (at least on an involuntary basis) unless such a power is expressly or impliedly granted in the enabling legislation: *Canadian Union of Public Employees, Local 394 v. Crozier* (2001), 84 B.C.L.R. (3d) 220 (C.A.).

19 *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781.

20 *C.U.P.E. v. Local 30 v. WMI* (1996), 34 Admin. L.R. (2d) 172 (Alta. C.A.); *Athabasca Environmental Assn. v. Alberta (Public Health Advisory & Appeal Board)* (1996), 34 Admin. L.R. (2d) 167 (Alta. C.A.);

intervention also provides a mechanism for the participation of public interest groups in a tribunal proceeding where such groups are not otherwise granted standing under the governing statute.

While provisions authorizing tribunals to hear from intervenors or "interested parties" are common in British Columbia legislation, there is a lack of consistency in the legislative approach.[21] In general terms, the statutes fall into four categories:

- statutes that provide express authority to allow participation by "intervenors" or "interested parties";
- statutes that provide express authority to allow the addition of "parties";
- statutes that provide express authority to add both "parties" and "intervenors";
- statutes that are silent on a tribunal's power to add either parties or intervenors.

In general, there is minimal legislative guidance on the distinction between an "added party" and an "intervenor", or the criteria that should be applied by tribunals in considering applications for either party or intervenor status. While some tribunals have included provisions in their published rules that address applications for intervenor or party status, few provide detailed guidance on the governing considerations. For the most part, the details are worked out on a tribunal-by-tribunal basis through the relevant jurisprudence. While such an approach may have the advantage of according tribunals a significant amount of discretion in resolving the highly contextual question of who should have status to participate, it does little to bring clarity and certainty to the process for tribunal users.

Furthermore, there is significant consistency in the approach adopted by tribunals in identifying criteria to govern applications for party or intervenor status. A tribunal's power to add a "party" is generally exercised where the applicant has a personal and direct interest in the outcome of the proceeding and is accordingly entitled to a fuller range of participatory rights.[22] Where such direct interest cannot be established, an applicant may be entitled to intervene in a hearing with a lesser

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John Keays and Paddy Goggins v. Assistant Regional Waste Manager and MB Paper, Appeal No. 97-WAS-10(a) (Environmental Appeal Board).

21 Examples of legislative added party/intervention provisions are set out in Appendix B.

22 See for example, *Forest Practices Board v. Government of British Columbia and Husby Forest Products Ltd. et al.*, Appeal No. 2000-FOR-009(b) (F.A.C.), interpreting the distinction between added parties and intervenors under ss.131(12) and (13) of the *Forest Practices Code*. This would seem to be analogous with the power of the trial courts in this Province to join parties to a proceeding under Rule 15(a)(iii), and their inherent power to grant standing to intervenors. As noted in *Canadian Labour Congress v. Bhindi et al.*, *supra*, the power to add parties under Rule 15 is limited to persons who have a direct interest in the precise outcome of the litigation between the original parties.

degree of participatory entitlement. In considering applications for interevenor status, tribunals look to common law tests, resolving such applications on the basis of the applicant's degree of interest in the proceeding and the usefulness of the proposed submissions.[23]

Given this consistency in approach, there would appear to be little disadvantage in providing tribunals with uniform powers to add parties and intervenors to an ongoing proceeding and much to be gained from the consistency and certainty that would result from a clear articulation of such powers. Such a reform could be implemented by including added party/intervenor provisions in model statutory powers legislation. These types of powers should be broadly available to tribunals acting in an adjudicative capacity particularly where tribunal decisions will potentially impact a broad constituency.

In a general sense, added party status would be available to persons directly affected by the tribunal proceedings with the added parties entitled to a full range of participatory rights. Persons having an interest in the proceeding that falls short of the requirement for party status might still be permitted to participate as intervenors with the extent of participatory rights left to the tribunal's discretion.[24]

Recommendation

Enact legislation, where appropriate, authorizing tribunals to add parties or intervenors to an ongoing proceeding and setting out the criteria on which such intervention would be permitted.

Standing of Statutory Decision Maker

A discrete issue that arises from a broad consideration of the question of standing before administrative tribunals is that of the standing of an administrative body to appear as a party on

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23 For example, *International Forest Products Ltd. v. British Columbia and Forest Practices Board*, Appeal No. 96/02(a) (Forest Appeals Commission); *Murphy v. British Columbia (Ministry for Children and Families)*, [1999] B.C.H.R.T.D. No. 8 (QL)(Human Rights Tribunal); *Houston Forest Products Co. et al. v. Assistant Regional Waste Manager et al.*, Appeal No. 99WAS-06(b), 08(b) and 11-13(b) (Environmental Appeal Board); *Lowan (c.o.b. Corner House) Re*, [1998] B.C.E.S.T.D. No. 261 (QL) (Employment Standards Tribunal); *Re Hauchecorne [Appl. for Standing]*, Securities Commission 2000/04/27.

24 There are precedents for "added party" and "intervenor" provisions in reform efforts in other jurisdictions. See *Proposal for an Administrative Hearings Powers and Procedures Act* (Canada – available on the Department of Justice website), Part II: Access to Proceedings; *Powers and Procedures for Administrative Tribunals in Alberta* (Alberta Law Reform Institute, 1999).

an appeal or review of its own decision. In the absence of an explicit grant of authority to fully participate in a hearing in these circumstances, a tribunal is generally limited to making submissions about jurisdictional matters including whether the tribunal lost jurisdiction through a patently unreasonable interpretation of its governing statute.[25]

Generally, standing is restricted in these cases because it would be unseemly for a decision maker to argue the correctness of its own decision. Limiting the role of a tribunal in these circumstances protects its impartiality and authority in future proceedings. Any attempt by a tribunal to argue the merits of the case between the parties appearing before it is seen to discredit the tribunal's impartiality on a re-hearing.[26]

This general restriction does not act as an absolute bar on participation by administrative decision makers on the merits of an appeal from their decisions. Where the policy concerns underlying the general rule against tribunal participation do not arise, courts have permitted administrative decision makers to speak to the merits of the decision under appeal. Frequently, the decision maker is the only party available to defend the decision in question (for example, in the licensing context) or to otherwise represent the public interest. In other cases, the successful party may not have the resources to effectively resist an application for review or appeal. In these circumstances, the decision maker may be "the only effective presenter of the other side of the case".[27] In other words, the restrictive approach to the standing of statutory decision makers has been tempered where limits on participation would prevent a full consideration of the case on appeal or review.[28]

Even where the two sides to a dispute are represented by other parties, the expertise of the tribunal may also suggest a need to temper the strict limits on its participation on judicial review.

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25 *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *C.A.I.M.A.W. Local 14 v. Paccar*, [1989] 2 S.C.R. 983.

26 "The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the context before the Board itself in the first instance". *Northwestern Utilities*, at p. 709.

27 *CPR v. The Information and Privacy Commissioner et al (In the Matter of the Judicial Review Procedure Act)*, 2002 BCSC 603, at para. 66.

28 *Nycan Energy Corp. v. Energy and Utilities Board (Alta.) et al.* (2001), 277 A.R. 391 (Alta. C.A.); *Salon Salon Hair Fashions Ltd. (Re)*, [1999] B.C.J. No. 381 (QL) (S.C.).

The limits on tribunal participation might in some cases be inconsistent with the increasing deference shown by courts to the decisions of expert bodies.[29]

While courts have responded to these types of concerns on an ad hoc basis, there continues to be considerable uncertainty in the law on the standing of a tribunal on appeal or review. In the absence of explicit legislative guidance, this issue will almost inevitably arise for determination when tribunal decisions are challenged. This problem has been addressed to some extent in British Columbia legislation, primarily through provisions that give explicit party status to licensing and other regulatory bodies on statutory appeals of their decisions.[30] However, disputes over tribunal standing continue to arise where there are no explicit statutory provisions, particularly on judicial review.[31] In the absence of express legislative guidance, the judicial restrictions on tribunal standing will continue to apply.

Recommendations

Provide greater legislative guidance on the scope of tribunal standing on appeal or judicial review.

Ensure that while the general principle of restrictive standing should continue to apply, there is greater scope for participation by a tribunal on review or appeal where there is an interest, particularly the public interest, that would otherwise not be fully represented.

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29 David J. Mullan, *Administrative Law* (Toronto, 2001), suggests the adoption of a discretionary approach that would focus on the question of "whether the participation of the tribunal is needed to enable a proper defence or justification of the decision under attack" (at p. 459).

30 For example, *Environment Management Act*, R.S.B.C. 1996, c.118, s.11(12); *Commercial Appeals Commission Act*, R.S.B.C. 1996, c.54, s.1; *Forest Practices Code*, R.S.B.C. 1996, c.159, s.131(7); *Securities Act*, R.S.B.C. 1996, c.418 s.167(5).

31 See for example the recent decision in *Darryl-Evans v. Empl. Standards*, 2002 BCSC 48, where the standing of both the Director of Employment Standards and the Employment Standards Tribunal on a judicial review was discussed.

SUMMARY OF RECOMMENDATIONS

Ambiguous rules about who can participate in administrative proceedings cause unnecessary confusion, uncertainty, delay and expense for individuals who come to tribunals for decisions or for the resolution of disputes. In order to identify those entitled to appear before administrative tribunals and avoid unnecessary proceedings over the scope of participatory entitlements, it is recommended that government:

Provide, as far as possible, in the context of tribunals engaged in party/party dispute resolution, unambiguous statutory provisions setting out who is entitled to appeal, to file a complaint or to otherwise invoke the process of the tribunal.

Provide, where open-ended standing provisions are necessary because tribunal decisions will affect a broad constituency:

- **consistency in the language of such open-ended standing provisions;**
- **legislative guidance as to the types of interests that are intended to be captured by the standing provision.**

Enact legislation, where appropriate, authorizing tribunals to add parties or intervenors to an ongoing proceeding and setting out the criteria on which such intervention would be permitted.

Provide greater legislative guidance on the scope of tribunal standing on appeal or judicial review.

Ensure that while the general principle of restrictive standing should continue to apply, there is greater scope for participation by a tribunal on review or appeal where there is an interest, particularly the public interest, that would otherwise not be fully represented.

APPENDIX A

Examples of Legislative Standing Provisions

"person aggrieved"

Credit Reporting Act, R.S.B.C. 1996, c.82, s.8
Debt Collection Act, R.S.B.C. 1996, c.92, s.7
Farm Practices Board, R.S.B.C. 1996, c.131, s.3(1)
Health Act, R.S.B.C. 1996, c.179, s.8(4)
Mortgage Brokers Act, R.S.B.C. 1996, c.313, s.9
Motor Carrier Act, R.S.B.C. 1996, c.315, s.54
Waste Management Act, R.S.B.C. 1996, c.482, s.44(1)
Workers Compensation Act, R.S.B.C. 1996, c.492 (Part III – Occupational Health and Safety), ss.200 and 208

"person dissatisfied"

Assessment Act, R.S.B.C. 1996, c.20, s.50

"person aggrieved or dissatisfied"

Natural Products Marketing Act, R.S.B.C. 1996, c.330, s.8(1)

"person affected"

Financial Institutions Act, R.S.B.C. 1996, c.141, s.236(1)(b)
Trade Practice Act, R.S.B.C. 1996, c.457, c.17.1(2)
Wildlife Act, R.S.B.C. 1996, c.488, s.101.1(1)

"person directly affected"

Credit Union Incorporation Act, R.S.B.C. 1996, c.82, s.98(1)
Financial Institutions Act, R.S.B.C. 1996, c.141, ss.242(1) and 237(3)
Securities Act, R.S.B.C. 1996, c.418, s. 165(3)
"interested person"

Cemetery and Funeral Services Act, R.S.B.C. 1996, c.45, s.10

"any other person with leave of the Board"

Electrical Safety Act, R.S.B.C. 1996, c.109, s.19(2)
Elevating Safety Devices Act, R.S.B.C. 1996, c.110, ss.19(2) and 20(3)
Gas Safety Act, R.S.B.C. 1996, c.169, s.27(2)
Power Engineers and Boiler Pressure Vessel Safety Act, R.S.B.C. 1996, c.368, s.27

"any person"

Pesticide Control Act, R.S.B.C. 1996, c.360, 15(2)

APPENDIX B

Example of Legislative Authority to Add Parties/Intervenors

authority to add "intervenors"

Human Rights Code, R.S.B.C. 1996, c.210, s.36(2)

authority to add "parties"

Commercial Appeals Commission Act, R.S.B.C. 1996, c.54, s.8
Labour Relations Code, R.S.B.C. 1996, c. 244, s.140(n)
Public Service Appeal Regulation, B.C. Reg. 133/94, s.7
Criminal Code, R.S.C. 1985, c.C-46, s.672.5

authority to add "parties" and "intervenors/interested parties"

Assessment Act, R.S.B.C. 1996, c.20, ss.52(2) and (3)
Forest Practices Code, R.S.B.C. 1996, c.159, ss.131(8) and (13)

authority to hear from "interested person" or "any other person"

Agricultural Land Reserve Procedure Regulation, B.C. Reg. 452/98, s.20(c)
Natural Products Marketing (BC) Act Regulation, B.C. Reg. 328/75, s.6(8)
Environment Management Act, R.S.B.C. 1996, c.118, s.11(12)
Mental Health Regulation, B.C. Reg. 233/99, s.